

<Article> The Law of the Individual-Exclusive Funded Enterprises and the Private Enterprise Sector in the People's Republic of China

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# THE LAW OF THE INDIVIDUAL-EXCLUSIVE FUNDED ENTERPRISES AND THE PRIVATE ENTERPRISE SECTOR IN THE PEOPLE'S RE- PUBLIC OF CHINA

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The concern of the present paper lies with the private enterprise sector and the legal framework relating to it in the People's Republic of China, or as abbreviated the PRC. As for the period under review, for the purposes of study, this is the period of progressive political and economic reform in the PRC that began with the historic 3rd Plenum of the 11th Central Committee of the Communist Party of China, or the CPC, as this was held in Beijing from 18 December to 22 December 1978. The occasion here referred to marked the formation of a firm consensus among the leadership elites in the upper echelons of the CPC, and at the central levels of the state government, as to the necessity of the radical reform of the political and economic structure in the PRC, and with this being understood to be the precondition for the continuing advance towards the full realization of what stands as the defining public policy objective in the PRC of socialist modernization. The forming of the consensus on political and economic reform, as adopted by the Party-State leadership elites as of December 1978, was very much the work of Deng Xiaoping. However, the consensus persisted as the Dengist era gave way to the era of Jiang Zemin in the early 1990s, and it persists still as we enter the now coming era which presents itself as the era of Hu Jintao. The leadership consensus on reform as the basis for future socialist modernization in the PRC, the substantive public

policy initiatives in the political and economic spheres conducive to reform, and the complex framework of laws and administrative regulations by means of which the reform policies have been given effect to: these set the context for discussion of the rise of the private enterprise sector in the PRC, and of the law which has come to be enacted for the purposes of its regulation.

Thus it is that in Part 1 of the paper, there is outlined the main thrust of political and economic reform in the PRC since December 1978, as this relates to reform in the sphere of the industrial enterprises. Here, the principal focus is with reform in the state industrial sector, as the leading and dominant sector in industrial production, and with the law of corporations as constituting the containing legal-institutional framework which has set the modalities for reform in the state industrial sector and, most crucially so, for the preservation within the sector of rights of public ownership. Following this in Part 2, the focus of attention shifts to the sphere of the enterprises which fall outside the province of the state industrial sector, and which are subject to rights of private ownership and hence are to be considered constitutive of the private enterprise sector proper. In this connection, there is provided a detailed exposition of one of the basic statutes that have been enacted to establish the legal framework for the regulation of the private enterprises in the PRC. The statute in question is the law relating to the private enterprises that are based in the capital investment funding supplied by private individuals, and with these being the enterprises which belong to the category of what are known as the individual-exclusive funded enterprises, or as we abbreviate this the IEFEs. Finally, there is in Part 3 of the paper some consideration given to the implications of the emergence of the private enterprise sector for the fabric of state and society in the PRC, and, in more specific terms, for the principles of constitutional order and for the basis and conditions of the monopoly rulership powers as exercised by the CPC. The most significant development reported on, here, is

that to do with the revision of the doctrinal foundations for the rulership of the CPC which as it has now been adopted by the CPC is closely associated with the person of Jiang Zemin, and which is known and propagated as the thought of the Three Represents.<sup>[1]</sup>

### **i. The Reform Era in the People's Republic of China and the State Industrial Sector**

The reform period in the PRC has involved the effecting by the Party-State leadership of a fundamental transformation in the organization and structure of the economic sphere. Essential to the transformation has been the decisive abandonment of the form of economic system which had been maintained in the PRC from the early 1950s and up to the end of the 1970s. This was the political command system of economic order, the two key defining features of which were as follows. First, the means of industrial production were rendered subject on a more or less exclusive basis to public ownership rights, as these were vested in and exercised by the state. Second, the political command economic system was such that the management of industrial production remained subject to the control and direction of the political-administrative authorities, as these pertained to the institutional structure of the central state government and the sub-central levels of government and to the institutional structure of the CPC at the different jurisdictional levels of political administration. The form of economic system that has since 1978 come to supersede the political command economic order is that of a mixed economic system. This mixed system has given effect to the principles of what in the PRC is termed the socialist market economic order, and with this involving the introduction of private ownership and market accountabilities as key strategic elements in the pursuit of the ends of socialist modernization. Thus the exclusivity of public ownership rights that distinguished the era

of the system of political command direction of the means of industrial production has given way to a mixed, or diversified, structure of ownership rights. This has meant that the public ownership of industrial production, as maintained by the state, now co-exists with ownership based in rights held by non-state parties, and with this occasioning the emergence of a significant sphere of industrial production which remains subject to rights of private ownership. In addition, the mixed economic system of the reform era has seen a relaxation in the control and direction of industrial production as exercised by the political-administrative authorities. The resulting liberalization in the industrial management framework has had the effect, as intended, of rendering the organizational units for industrial production more responsive to the market disciplines, and so more efficient in the discharging of their production functions.

The part of the economic sphere in the PRC that has been of central concern during the era of reform is the state industrial sector, and with the reform of the industrial state-owned enterprises, or the industrial SOEs, being of the highest priority for the Party-State leadership in the formulation and execution of the general public policy for reform. The central position occupied by the state industrial sector in the reform programme pursued in the PRC since 1978 is readily explained. For it was the state industrial sector which stood as the foundation of the political command economic order of the pre-reform period, and which stood indeed as the concrete institutional embodiment of all the key essentials of the political command mode of economic direction. The industrial SOEs in the PRC were established during the 1950s on the model of the Soviet form of state-directed industries, and, as at that time, they comprehended all the vital strategic sectors in heavy industrial production as relative to defining national interests, and with these including such sectors as those of coal, iron and steel, oil, power, metallurgy, machinery, chemicals, petro-chemicals, and textiles. The rights of ownership pertaining to the industrial SOEs were, by defi-

dition, public ownership rights vested in the state, and which, as such, had their basis in the state acting as the sole and exclusive supplier of the capital investment funding for the enterprises. At the same time, the industrial SOEs were subject in their functions and operations to an elaborate range of political command directional powers, which powers were exercised through the various authorities comprising the system of political administration. Thus there were political command directives applying to such key matters as the production plans of the industrial SOEs, and the allocation to them of capital investment funds. Other matters concerning the functioning and operations of the industrial SOEs, where political command directives had decisive application, included the supply of raw materials to the enterprises, the pricing of enterprise goods and products, the marketing and sale of goods and products, and the use of enterprise profits. Also included, here, were the supply and engagement of the enterprise workers, the rate and distribution of their wages and bonuses, and the organization and provision of their welfare and social security benefits.

The system of political administration through which the industrial SOEs were made subject to political command direction involved authorities belonging to the distinct institutional spheres of the state government and the CPC. The state-governmental authority that was to be pivotal in the political command direction of the industrial SOEs was the State Council. The State Council was established in 1954, and it has since that time ranked as the highest organ of state administration in the PRC. As such, the State Council has exercised, as it continues to exercise, the executive powers which are specific to the central level of state government and political administration. In its status as the central-level executive power, the State Council includes the Prime Minister of the PRC, the Vice-Premiers, the State Councillors, and the heads of the principal departmental administrative organs of the state government. The latter are the State Council Ministries and the State Council

Commissions. In addition, there are certain departments under the State Council, such as those responsible for prices, taxation, auditing and supervision, which are independent of the Ministries and Commissions and which form what we may refer to as the State Council administration proper. While the State Council stands as an institution of state government at the central level of political administration, its organizational structure also extends from the central level to the various sub-central levels of government and political administration. Thus the Ministries of the State Council, together with the departments pertaining to the State Council administration proper, have their respective subordinate branch offices established in the provinces, the regions and the municipalities and the other levels of local government jurisdiction.

The State Council served to give organizational form to the political command economic system, as this was established in the 1950s. The departmental administrative organs of the State Council that were to play the key role in this were the Ministries which were designated as being responsible for the various industrial sectors, such as machine building, power, fuel, textiles and so on. This was so especially with regard to the disposition of the industrial SOEs in relation to the overall structure of government and political administration. For the industrial SOEs that belonged to the different industrial sectors were made subject to the political-administrative authority of the appropriate and corresponding sectoral-organized Ministries. At the same time, it was through these Ministries at the central level of government and political administration, and through the subordinate departmental branches of the Ministries at the sub-central levels, that there were exercised on behalf of the state the ownership rights which related to the industrial SOEs and to the capital and assets vested in them. In addition to the sectoral organization of the industrial SOEs, the State Council acted through its departmental administrative organs to command and direct industrial production, such as to provide gen-

eral co-ordination and centralized planning in respect of all the various functions and operations of the industrial enterprises. Of critical importance, in this connection, were the organs of the State Council which were not tied in jurisdictional terms to the specific industrial sectors. These included, for example, the Ministry of Labour, which administrative department exercised overall powers for the supply and deployment of industrial workers. Also, there must here be mentioned the key departmental administrative organs of the State Council which came to exercise overall powers relating to the allocation of the state-supplied capital investment funds to the industrial enterprises, and with these being the Ministry of Finance and the People's Bank of China.

Above all, there are the two Commissions of the State Council that, in the 1950s, came to assume the overall responsibility for state-directed planning in the industrial sphere: the State Planning Commission, which was established in 1952 and incorporated within the State Council organizational structure as of 1954, and the State Economic Commission, which was established in 1956 and which remained in being until 1988 when it came to be formally merged with the State Planning Commission. The defining functions and powers discharged by the State Planning Commission and the State Economic Commission in the political command economic system were fundamental, given that centralized planning by the state agencies was the underlying basis for the political command direction of the means of industrial production. Thus it stood as the principal task of the two Commissions to formulate and apply the mandatory production plans that were determined for the industrial SOEs through consultation with their respective ministerial authorities. At the same time, the Commissions acted to relate the mandatory production plans specified for the industrial SOEs to the containing public policy framework for industrial production, as this was embodied in the national state budget and in the annual, the five-year and the longer term national economic plans whose draw-



ing up and implementation stood as one of the core institutional responsibilities of the State Council. The defining functions and powers of the State Planning Commission and the State Economic Commission in relation to the industrial sphere, as with those of the Ministry of Labour, the Ministry of Finance and the People's Bank of China, were functions and powers relating to macro-economic policy and organization, and the macro-level economic functions and powers of these State Council organs, it must be understood, were of the very essence of the political command direction of industrial production in the pre-reform era.

The apparatus of power embodied in the State Council was from the first subject to the control and domination of the CPC, as the CPC leadership exercised its rulership in the PRC through the institutions of state government. However, there has always existed an organizational structure within the CPC that remains separate from the state-governmental institutions, and this organizational structure was to play its own part in general political administration in the PRC, as it was to do also, in more specific terms, in the political command direction of the means of industrial production. The core central-level institutions of the CPC include the National Party Congress, the Party Central Committee, the Political Bureau of the Central Committee, the Standing Committee of the Political Bureau, and the Secretariat of the CPC. Standing below the central-level organs here listed are the local party congresses and the local party committees established at the sub-central levels of political administration. Lower still in the system of CPC-based political administration, there are the party organs at the grass-roots and work-unit levels. Prominent among these are the CPC committees, as led by the committee secretaries, which are required to be established in the industrial SOEs, and which, as so established, were to prove to be essential to the overall organization of the state industrial sector under political command economic direction. Finally, there are the departments and agencies comprising the central party bureau-

cratic system which comes under the direct control of the Secretariat of the CPC. These departments and agencies include key CPC organs such as the economic departments responsible for industrial planning and for finance and trade. The central party bureaucratic organs have been critical to the discharging by the CPC of its political-administrative functions and powers, and this for the reason primarily that for certain purposes of overall general policy direction and co-ordination the departmental administrative organs of the state government have been rendered subordinate to them. This is true not least of the era of political command economics, when the administrative departments of the state government having designated responsibilities in the industrial sector were made accountable to the central party industrial planning department.

The control that the CPC came to exercise over the industrial SOEs, as through the system of the CPC enterprise committees, underlines what has always been the firm determination of the elites in the CPC who have formed the Party-State leadership to maintain the single-party rulership of the CPC, and to maintain the political control of the CPC over the whole of state and society in the PRC. Indeed, the subjection of the means of industrial production to the regime of political command economic direction in the 1950s was itself a very precise function of that determination. For the industrial SOEs at that time comprised the sphere of the strategic industrial sectors, and hence comprised the sectors of industrial production where organizational control carried with it the prospect of the control and domination of the entire social and political order.

However, the subjection of the means of industrial production to political command economic direction was bound up with very much more than the intention to secure the political leadership position of the CPC. For there was, in addition, the intention to give effect to the principles of the core socialist doctrine which, as it was derived from Marxism-Leninism and the teachings of Mao Zedong, was presented as grounding the legitimacy of the CPC in its claims

of political rulership. The bringing of industrial production under political command economic direction meant that it was to be made subject to public ownership rights as vested in the state, and with this carrying with it the prospect that the means of industrial production would be so controlled and organized as to meet the needs of the whole people and to answer to their interests. This meant, in its turn, that the CPC, as exercising rulership in the state and commanding the means of industrial production, would in consequence of these powers be able to maintain the position that belonged to it in ideological terms as the custodian of the will and interests of the people, and so be able also to discharge the functions which were integral to this custodianship. Thus was the system of political command economic direction, in the state industrial sector, understood to stand as an expression of the principles of adhering to the socialist road, the democratic dictatorship of the people, the leadership of the CPC and the upholding of Marxism-Leninism and Mao Zedong Thought that were to be affirmed from the first, and that in their essentials continue to be affirmed, as the so-called four cardinal principles which describe and embody the legitimating foundations of the PRC as such.

The political command direction of industrial production, as the system was set in place in the PRC in the early 1950s, did not prove a success, and the failings of the system were by the late 1970s so apparent as to demand its reform. To begin with, there was no proper settlement of the internal organizational structure of the industrial SOEs. For the management officials, or factory directors, who had formal responsibilities for the production functions of the enterprises were always subject to challenge, as to their authority, by the secretaries of the CPC committees and the representatives of the workers' congresses and trade union organizations as these were established in the enterprises. Related to this, there was the fundamental problem that within the system of political administration, the officials belonging to the CPC institutions and the offi-

cially belonging to the state-governmental institutions exercised overlapping, and competitive, jurisdictional authorities with respect to the enterprises and to the political command direction of their production functions and operations. This problem was further complicated by the subjecting of the enterprises to the rival jurisdictional claims of the CPC and state-governmental organs as asserted at the central and the sub-central levels of political administration. Thus it was that in the period of the Great Leap Forward from 1958 to 1961, the centralized system of political command economic direction, and the internal management structure within the enterprises, were alike undermined through the appropriating of command powers over the enterprises by the local-level CPC committee officials. Again, the period of the Cultural Revolution from 1966 to the mid-1970s saw the disintegration of effective political command direction of industrial production, and virtual anarchy within the enterprises, as management control passed to CPC members belonging to the irregular cultural revolutionary committees. As a final consideration, it must be emphasized that the industrial SOEs, as subject to the system of political command economic direction, remained insulated from the market disciplinary mechanisms, and so remained in consequence of this marred by radical inefficiencies as determinable through reference to the market absolutes. So, for example, there were such inefficiencies in the state industrial sector as over-manning, expensive social insurance schemes and welfare support institutions for the enterprise workers, and the distortions in the pricing system which arose from interventionist state subsidies and from the absence of proper competition among enterprises.

The failings of the political command economic system were a grave matter for the Party-State leadership in the PRC, and particularly so in respect of the abiding concern of the leadership to preserve the single-party rulership position of the CPC. For it was through the political-administrative machinery of the Party-State organizations that the means of industrial production were com-

manded, and so in the event that the industrial enterprises failed, and the expectations of the people as to their success were disappointed, then the credibility of the Party-State organizational structure would be impaired and the very legitimacy of the CPC leadership brought into question and undermined. The issue, here, for the Party-State leadership was as much political as it was economic, as is clear from the deliberations of the leadership at the 3rd Plenum of the 11th Central Committee of the CPC in December 1978.<sup>[2]</sup> Thus it was recognized as the guiding principle for reform that while the development of the productive forces within society, so as to serve the ends of socialist modernization, remained the primary objective, the developing of productive forces was nevertheless such as to necessitate the adaptation, and reform, of those aspects of the existing economic production relations and the social-political superstructure which were not as such conducive to the proper development of the forces of production.<sup>[3]</sup> What this meant for the Party-State leadership, in regard to the state industrial sector, was that the powers and responsibilities relating to enterprise management were to be delegated down to the level of the enterprises themselves, and with this to be effected in order to overcome what was picked out by the leadership as the problem of the overcentralization of decision-making authority in the established structure of national-level economic management. In addition, the Party-State leadership called for a proper differentiation in role, functions and powers as between CPC officials, state-governmental officials and enterprise management officials, and with this being intended to overcome what we have referred to as the problem of the jurisdictional overlapping within the system of political administration as between the CPC and the state-governmental authorities in regard to the direction of the industrial enterprises.<sup>[4]</sup>

The proposals made in December 1978 for the delegation of management decision-making powers to the industrial SOEs, and for the differentiation of the industrial enterprises from the institu-

tional spheres of the CPC and the state government, were to prove central to the development of the strategies pursued subsequently for the reform of the state industrial sector in the PRC. Thus there were implied in the proposals all the measures that were later to be adopted that had as their aim the enhancement of the efficiency of the industrial SOEs, through the application to them of the disciplinary constraints which were essential for the ends of market liberalization. Of crucial importance, here, was the endeavour of the Party-State leadership to liberate the enterprise management officials from subjection to political command economic direction, and to confer on them a wide range of independent decision-making rights and powers. At the same time, there were implied in the proposals from 1978 all the measures that were to be adopted, in order to promote state industrial sector reform, which served to bring about a radical change and alteration in the terms of the institutional relationship between the industrial SOEs and the containing system of political administration. The measures that were in this connection to be crucial were those relating to the introduction of the modern corporation system in the PRC, and, more specifically, to the establishing of the industrial SOEs as corporate entities based in principles of share-holding and limited liability. This was to involve the detaching of the industrial SOEs from the institutional structure of political administration, in the respect that incorporation conferred on the enterprises an independent legal person status that was distinct from the status of political-administrative units which they had held under the system of political command economic direction. There was also involved in the introducing of the corporation system a fundamental transformation in the basis of ownership rights in respect of the enterprises. For incorporation in accordance with the principles of share-holding was to lead to a mixing of public ownership rights with private ownership rights in the state industrial sector, as the capital investment funding for the enterprises became diversified through the supplementing of state-

supplied capital with capital supplied by non-state parties.

The working through of reform in the state industrial sector, as this went along the lines envisaged by the Party-State leadership in December 1978, was to have a profound impact on the whole system of government and political administration in the PRC. One key area of impact came in the shift in the functions of the political-administrative institutions, in respect of industrial production, away from political command directional functions and towards functions which are more properly described as those of regulation and supervision. This shift is reflected, most particularly, in the reforms that were to be made to the organizational structure of the State Council in response to the developments in the sphere of industrial production. Among these reforms, there stand out the establishment in 1993 of the State Economic and Trade Commission, and the decision in 1994 to place the China Securities Regulatory Commission under the direct administrative auspices of the State Council. There is also the formal designation in 1998 of the Ministry of Finance, the People's Bank of China, the State Economic and Trade Commission and the as then newly formed State Planning and Development Commission as the administrative departments of the State Council having and exercising overall macro-economic-level powers in respect of the state industrial sector.

The state industrial sector reform was also to have its impact on government and political administration through its being closely bound up with the more general development during the reform era towards the establishing, and nurturing, in the PRC of the rule of law and the legal system as the basis for the exercise of governmental and political-administrative powers. As an indication of this, the period of reform beginning in December 1978 has witnessed a marked strengthening in the role and functions of the National People's Congress. This is the institution of government that stands as the organ of supreme legislative power in the PRC, and that, as such, is the source and origin of the basic framework stat-

utes which comprise the law of the PRC. In addition to this, there has taken place since December 1978 a marked strengthening of the procedures for the issuing of administrative regulatory norms on the part of the State Council, and on the part of its constituent departmental administrative organs. The administrative regulations deriving from the organizational structure based in the State Council have been critical in giving implemental effect to the statute law enacted through the National People's Congress, and, in this aspect, the administrative regulatory norms of the State Council and its various administrative departments must be viewed as going together to form the main body of substantive administrative law in the PRC. The framework of laws and administrative regulations in the PRC is of the first importance in understanding the reform of the state industrial sector, at the level of both its form and its substance. For the state industrial sector reform has involved the substituting of the rule of law for political command direction, and so also for state proprietorship, as the organizing principle and foundation for the relationship of the state, and the political-administrative authorities pertaining to state and government, to the means of industrial production. Thus it is that the laws and administrative regulations describe the processes and procedures that have given effect to reform in the state industrial sector, in addition to describing the formal structure and substantive elements of the legal organization of the means of industrial production in their reformed condition.<sup>[5]</sup>

There are two principal measures that have served to set the basic legal framework for reform of the state industrial sector, and that must be reckoned with here. First, there is the Law of the Industrial State-Owned Enterprises of the PRC, or the Enterprise Law, which was adopted at the 1st Session of the 7th National People's Congress on 13 April 1988.<sup>[6]</sup> Second, there is the Corporation Law of the PRC, which was adopted at the 5th Meeting of the Standing Committee of the 8th National People's Congress on 29



December 1993, and revised at the 13th Meeting of the Standing Committee of the 9th National People's Congress on 25 December 1999.<sup>[7]</sup>

The Enterprise Law presents itself for consideration through its standing as the basic statute relating to the affairs of the industrial SOEs. Two core elements of the Enterprise Law merit particular reference, as fulfilling the requirements for enterprise reform of the kind that had been pointed to by the Party-State leadership in December 1978. First, there are assigned to the management officials in the enterprises a range of independent decision-making rights and powers, and with these having specific application to the possession, use and disposal of the enterprise assets and properties. The rights and powers are specified in Chapter 3 (Articles 22-34) of the Enterprise Law, which rights and powers serve to confirm management independence in the enterprises in respect of such functions and operational contexts as production planning, marketing of products, pricing of goods and products, wages and bonuses for workers, engagement of workers, and participation in business transactions and arrangements with other economic entities as through investment and share-holding. Second, the Enterprise Law provides for a settlement of the disposition of powers and authorities within the internal organizational structure of the industrial SOEs, and with the settlement having application to the institutional relations holding as between the management officials, the secretaries of the CPC committees and the officials acting for the workers' congresses and trade union associations. The terms of the settlement are such as to work very much in favour of the management officials, as the officials exercising the independent decision-making rights and powers which concern enterprise functions and operations. Thus it is affirmed in Chapter 4 of the Enterprise Law that the factory directors stand as the management officials holding the central leadership position within the enterprise organizational structure, and hence as holding the formal status of the legal repre-

sentatives of the industrial SOEs.

The parts of the Enterprise Law relating to the rights and powers of management officials, and to the organizational structure of the industrial SOEs, looked forward to the establishing of the corporation system in the PRC, and hence to the incorporation of the industrial SOEs, as in accordance with the terms of the 1993 Corporation Law. The corporation system, as the legal-institutional context for state industrial sector reform, has involved the application to the industrial SOEs of the principles of share-holding and limited liability. Thus it was provided that the industrial SOEs that were to be incorporated were in principle (and subject to certain exceptions) eligible to have their capital investment funding constituted as shares, and with the liabilities of share-holders being limited to the extent of their capital investment. The intention, here, was to facilitate a significant enlargement in the sources of capital investment funding for the industrial SOEs, and particularly so in regard to the enlarging of capital investment funding from non-state parties such as to create a mixed capital investment structure for the state industrial sector. This policy objective was reflected in the establishing of state-controlled stock exchanges in the period prior to the enactment of the Corporation Law in 1993, as with the establishing of the Shenzhen Stock Exchange in 1991 and the Shanghai Stock Exchange in 1992. The policy aimed at mixed capital investment in the state industrial sector was further underlined in July 1992, through the official designation of the categories of shares that were available for holding in the industrial SOEs. Thus there were designated shares held by the state, either as state shares or as corporate shares owned by the state, in addition to shares held by non-state institutions, non-state shares held by private parties as individual or personal shares, and shares reserved for foreign investors.

The establishing of the corporation system in the PRC has resulted not only in the introduction of a mixed capital investment structure for the state industrial sector. At the same time, it has re-

sulted in a transforming of the terms of the relationship of the industrial SOEs with the containing system of government and political administration. Thus it is that the incorporation of the industrial SOEs has involved their dissociation from the political-administrative system, and hence also their liberation from the regime of political command economic direction. The process referred to here has come about essentially as the direct effect of the acquiring by the incorporating industrial SOEs of the form of independent legal personality which is specific to corporations. The core elements of the independent legal person status belonging to the industrial SOEs established as corporate entities are those that are to be found present in the terms of the Corporation Law, and with the most critical of these being as follows. First, there is the procedure for the establishing of enterprises as corporations bearing independent legal person status. This includes the adoption by the incorporating enterprises of a corporation charter, as well as the application of the rules relating to the inspection, validation, certification and licensing of enterprises as corporations by the relevant departmental administrative organs of the state government.

A second defining element of the legal person status specific to industrial SOEs established as corporations comprises the independent decision-making rights and powers which are conceded to them in law. Thus do the incorporated industrial SOEs possess the various rights and powers relating to management decision-making which are affirmed in the 1988 Enterprise Law. The third defining element of the legal person status of the incorporated industrial SOEs comprises the internal organizational structures, as prescribed in law, that set the institutional framework through which the independent decision-making rights and powers belonging to them are to be exercised. These organizational structures are complex, and they go far beyond the terms of the 1988 Enterprise Law to involve the following principal component parts: the institution of boards of directors as the supreme executive authority for the corpo-

rations, the board chairmen as the designated legal representative officials of the corporations, and the management officials as agents for the boards of directors in matters relating to the production functions and operations of the industrial SOEs as corporate entities. The institutional frameworks for the internal organization of the incorporated industrial SOEs relate to what forms the fourth main element of the legal personality belonging to the industrial SOEs as corporations. This is the separation of, and the distinction between, ownership rights and powers and management rights and powers. The distinction between ownership rights and powers and management rights and powers is fundamental for corporations whose capital investment funding is based in principles of share-holding. However, the distinction is also to be reckoned crucial in the case of corporate entities, such as are established in the PRC, where capital investment, and hence also ownership rights and powers, remain subject to the state and exercised through the governmental authorities in the state.

The 1993 Corporation Law describes the standard corporation forms that the industrial SOEs are to assume for the purposes of their incorporation, and with these being the limited liability corporations and the joint-stock corporations. In Chapter 2 (Articles 19-72) of the Corporation Law, there are set down the principles relating to the founding and organizational structure of limited liability corporations, while in Chapter 3 (Articles 73-128) there are set down the principles relating to the founding and organizational structure of joint-stock corporations. As provided for in the Corporation Law, the limited liability corporations and joint-stock corporations stand as corporate entities which are based in principles of share-holding. Thus the capital investment funding pertaining to the two corporation forms is to be constituted as shares, and with the share-holders bearing rights of ownership, and hence also liabilities, to the limit of their individual capital investments. Further, the capital investment in respect of both corporation forms is

to be subscribed, and the shares issued in respect of it are to be registered, on the occasion of incorporation and where the capital investment is eligible to be supplied, and the shares constituting it eligible to be held, by the state and its agents and by non-state parties alike.

In addition to the standard form limited liability corporations and joint-stock corporations, there is reference made in the Corporation Law to a category of limited liability corporations that are designated as the state-exclusive investment corporations, or, as this is here abbreviated, the SEICs. The principles relating to the founding and organization of the state-exclusive investment category of limited liability corporations are laid down in Articles 64 to 72 of Chapter 2 of the Corporation Law. There are close and significant parallels between the SEICs and the standard form limited liability corporations and joint-stock corporations. However, it is crucial to understand that in contrast to the standard form corporations, the SEICs are not to be counted as share-holding corporations in two key respects. First, the subscription of share capital does not stand as an essential component part of the procedure for the establishing of the SEICs as corporate entities, and, second, the capital investment supplied to the SEICs does not stand as capital that is eligible to be provided by non-state parties acquiring, and possessing, shareholder status. On the contrary, the SEICs have the status of corporate entities where the capital investment funding, such as is essential for the purposes of incorporation, is to be supplied by the state on a sole and exclusive basis, and with the state being, for this purpose, represented through the administrative departments of the state government which exercise the designated capital investment powers and capacities.

The limited liability corporations and joint-stock corporations share certain basic features in common, and particularly so with respect to the internal organizational structures prescribed for them. As corporate entities based in principles of share-holding, the lim-

ited liability corporations and the joint-stock corporations are corporations where the share-holders, as the suppliers of capital funds and the bearers of ownership rights, stand as sovereign within the institutional framework of the corporate association. Hence the foundation of the organizational structure for the two corporation forms lies with the formal meetings of share-holders, as the institutional bodies through which share-holders act in their collective capacity. The rights and powers assigned to the meetings of share-holders reflect the sovereignty of share-holders as the subjects of corporate ownership rights. Thus the meetings of share-holders possess rights of deliberation, decision-making and ultimate approval in such matters to do with the affairs of corporations as overall business strategy and investment planning, annual budgetary plans and final accounts, profit distribution plans, increases and reductions in the amounts of registered capital, and alterations to the terms of corporation charters. In addition, the meetings of share-holders in the limited liability corporations and joint-stock corporations have the right and power to elect the members of the boards of directors acting for the corporations, and also to deliberate on, and to give final approval to, the reports which the boards of directors are required to submit to share-holders.<sup>[8]</sup>

According to the terms of the Corporation Law, the boards of directors comprise the highest executive organs of the limited liability corporations and the joint-stock corporations. As such, the boards of directors represent the share-holders as bearers of ownership rights, and with this representative relation to share-holders being underlined through the assignment of the formal status of the legal representative officials for the corporations to the chairmen of the boards of directors. In their representative functions in relation to share-holders, the boards of directors are subject to the rights and powers belonging to the share-holders as the sovereign corporate authority, and as are exercised through the meetings of share-holders. Hence the boards of directors are required to convene meet-

ings of share-holders, to prepare work reports for submission to share-holders for formal approval, and to implement such formal decisions and resolutions of share-holders as are made at their meetings. One further executive power belonging to the boards of directors is the power to appoint, and to dismiss, the general managers of corporations. This power is critical, and its exercise ensures that the management officials of corporations, at the level of their production functions and operations, remain subject to the executive authority of directors and hence subject to the rights of share-holders. Thus the general managers of corporations are responsible to the boards of directors, as regards the exercise of the designated management powers that concern such corporation matters as the appointment of subordinate management officials, and the formulation and implementation of management production plans, annual business strategies and investment plans.<sup>[9]</sup>

Beyond the meetings of share-holders, the boards of directors and the general managers, there remain certain other important institutions that are to be recognized as institutions which belong to the organizational structures prescribed in the Corporation Law for the two standard form corporations. One such institution is that of the supervisory committees, which bodies are committees of internal discipline with powers to inspect corporation finances, and to investigate breaches of the terms of corporation charters and breaches of general law as perpetrated by corporation officials.<sup>[10]</sup> A further institution to be noted, here, is that of the workers' congresses and trade union organizations, with the representatives of the workers being guaranteed formal consultation rights in management decision-making which relate to the interests of workers.<sup>[11]</sup> Finally, there is the institution of the CPC committees and secretaries, and with the presence of these in the organizational structures for the incorporated enterprises being made the subject of an explicit provision which is contained in the general principles of the Corporation Law.<sup>[12]</sup>

The supervisory committees, the workers' bodies and the CPC committees are integral parts of the organizational structures prescribed for the standard form corporations, and, as such, they discharge functions which are essential to the ends of corporate governance. Despite this, however, it is the meetings of share-holders, the boards of directors and the general managers that must be considered as central to the proper understanding of the standard form corporations in regard to their internal organization as corporate entities. This is so, most particularly, in understanding how the material application of the principles of corporate organizational structure to the industrial SOEs has functioned in the general reform programme as pursued in the PRC for state industrial sector. For it is the presence of the meetings of share-holders, the boards of directors and the general managers, as the three basic institutional components of corporate organizational structure, that reflects the transformation effected to the industrial SOEs through the assignment to them of the status of corporations having independent legal personality, and as based in the principles of share-holding and limited liability.

There is one fundamental distinction between the limited liability corporations and the joint-stock corporations that goes beyond the fact of their common organizational structures, and to the very essentials of their status as corporations based in share-holding. In specific terms, the joint-stock corporations stand as corporations that have the status of what, in Anglo-American law, are designated as public limited companies or public or publicly held corporations. This is so in the respect that the shares, as constitute the capital investment funding of the corporations, are eligible to be freely exchanged and transferred by share-holders to non-share-holders by means of free transactions in the open market. Thus ownership rights in the joint-stock corporations, as determined through holdings in shares, are rights that, in principle, remain subject to alteration and modification through open-market transac-



tions without restrictions based in prior rights and privileges belonging to existing share-holders. However, the matter is quite different in the case of the limited liability corporations, and with these effectively having the status of what, in Anglo-American law, are designated as private limited companies or closed corporations. Thus it is stated in the Corporation Law that the shares constituting the capital investment funding for the limited liability corporations are not eligible to be exchanged and transferred by share-holders through open-market transactions. To the contrary, it is expressly provided that transfers of shares by investors to non-share-holders are transactions that require the approval of a majority of existing share-holders, and that, with respect to such transactions, the existing share-holders possess the rights and privileges of first options on the purchase of the shares submitted for transfer.<sup>[13]</sup>

As we have noted, there is recognition given in the Corporation Law to the category of limited liability corporations that are designated as corporations based in state-exclusive investment. The SEICs are to be distinguished from the standard limited liability corporations and joint-stock corporations in the respect that they are not corporations where capital investment funding is subscribed, constituted and held in the form of shares, but are rather corporations where, for the purposes of incorporation, capital investment funding is supplied on a sole and exclusive basis by the state as represented through its designated departmental administrative organs. In contrast to the limited liability corporations and the joint-stock corporations, then, the SEICs stand as corporations where all supplied capital investment funds, and hence all ownership rights, pertain to the state, and where, as a matter of strict law and as a matter of strict definition, there are no share-holding mechanisms which allow for the extending of capital investment opportunities and ownership rights to non-state parties. As it happens, some limited extension of share-holding arrangements has occurred with the SEICs, such that non-state parties have been enabled to contribute

to their capital investment funding. However, this has not qualified the absolutism of the ownership rights held by the state in the SEICs. Nor has it served to qualify the status of the SEICs as corporations where all capital investment is to be state-supplied for the purposes of incorporation, and where only the state and its agents are to have standing as parties of interest for the purposes of the organizational structure of the corporations. Here, it must be emphasized that since the SEICs are corporations whose capital investment funding is not based in share-holding, it follows that there is no provision made in the Corporation Law for the organizational structure of the SEICs to include the institution of the formal meetings of share-holders. For the SEICs, it is the state, rather than some institutional body of share-holders, that stands as sovereign within the framework of the corporate association. Accordingly, the organizational structure of the SEICs is limited principally to the institution of the boards of directors and to the general managers.

The basis of the organizational structure of the SEICs lies in the institution of the boards of directors, and with these, in the absence of share-holders proper, being appointed by and answerable to the administrative departments of the state government which are charged with responsibilities for capital investment in the SEICs concerned. The rights and powers of the boards of directors established for the SEICs are, in principle, those specified for the boards of directors of the standard form limited liability corporations, and with the board chairmen having the status relative to the SEICs of being their official legal representatives. However, the rights and powers of the boards of directors of SEICs in regard to certain matters, such as corporation mergers and corporation capital, remain subject to the scrutiny and approval of the responsible investing administrative departments of the state government. In addition, it is provided that the board chairmen, as the official legal representatives for the SEICs, are to be appointed by the relevant state-governmental administrative departments. Thus are the rights and

powers of the boards of directors for the SEICs circumscribed by the rights and powers of the state government, and to an extent unparalleled with the corporations which fall within the standard limited liability and joint-stock categories. The general managers for the SEICs are to be appointed by the boards of directors, and the rights and powers belonging to them are those which are expressly assigned to the general managers acting for the standard form limited liability corporations. Even so, the general managers for the SEICs still remain subject to close state control, in the respect that their appointment and activities remain subject to the approval of the boards of directors, which are themselves established through direct state appointment and authorization.<sup>[14]</sup>

The state-exclusive investment category of corporation is central in the reform of the state industrial sector in the PRC, as this has been effected by the Party-State leadership through the policy of having the industrial SOEs established as corporate entities. For the industrial SOEs that have been designated by the state-governmental authorities as strategic, and hence as foundational within the state industrial sector, are enterprises that have for the most part been established as corporations which are state-exclusive investment in form. That this is so underlines what has been the determination of the Party-State leadership to bring into being a mixed economic framework as in accordance with the principles of the socialist market economic order, but where the means of industrial production are maintained in subjection to what are overall rights of state ownership and state ownership control. To be sure, the state industrial sector has seen the establishing of industrial SOEs as limited liability corporations and joint-stock corporations, where capital investment funding is supplied in part or in whole by non-state parties and hence where the state itself has come to be compromised in respect of ownership rights and control. However, the fact remains that state ownership in the means of industrial production, in the strategic sectors where vital national in-

terests are at issue, has been enduring and persistent in the reform era. As evidence for this, there is the consideration that the industrial SOEs incorporated in accordance with the limited liability and joint-stock principles have commonly functioned as the subsidiaries of parent-level corporations, and where the latter are state-exclusive investment form corporations. Here, the subsidiaries stand as shareholding corporations that remain open to non-state-supplied capital investment, while standing also in final subordination to parent-level corporations which are not only state-exclusive in respect of their own capital investment funds, but are themselves the major share-holders in, and hence the major suppliers of capital to, the corporations which are subsidiary to them. The parent-subsidiary form of corporate organization is a fundamental feature of the state industrial sector reform in the PRC, and it presents itself as a corporate organizational structure where the means of industrial production have been preserved for ultimate state ownership and control, but at the same time have been supported through the generation of a mixed, or diversified, capital investment structure.

The law of corporations in the PRC, in its primary context of application, has served to set the legal-institutional framework for the reform of the state industrial sector, and with this framework providing, as we have seen, for the maintenance of the public ownership rights as held by the state in the means of industrial production. Hence there follows the central position within the corporation system of the state-exclusive investment form of enterprise incorporation, as there follows also the crucial significance of the parent-subsidiary corporate organizational structure as setting modalities for overall state ownership control of the strategic areas of industrial production in conditions of diversified capital investment funding. In the event, the era of reform in the PRC since 1978 has witnessed not only the reform of the state industrial sector. It has witnessed also the rapid rise of the private enterprise sector, where the enterprises that comprise the sector have been free from all subjec-

tion to public ownership rights. In the early years of the reform era, the scale of the private enterprise sector was very small, and the position adopted by the political-administrative authorities in respect of it was essentially non-interventionist. Indeed, the main achievement of the political-administrative authorities at first lay simply in the allowing of the private enterprises to establish themselves, and then to develop in accordance with their own independent economic momentum. However, the private enterprise sector was to expand massively during the 1990s, and this expansion compelled the political-administrative authorities to move from non-interventionism to the positive construction of some appropriate legal-regulatory framework. The intention in this was to establish a body of law, and the relevant machinery of political administration, which would be transparent sufficient for the needs and purposes of private entrepreneurs, and which would, in principle at least, be non-discriminatory for the private enterprises as in relation to the state-owned sectors of industrial production.

It should be emphasized at once that the Corporation Law has of course played its own part in forming the legal-regulatory framework for the emerging private enterprise sector, through its providing for the incorporation of enterprises in accordance with the principles of share-holding. Thus the terms of the Corporation Law are such that it is provided that industrial SOEs may be removed from the state industrial sector through their being established as limited liability form corporations, or as joint-stock form corporations, in circumstances where the capital investment funds are subscribed by non-state parties and where the ownership rights stand as private ownership rights. So also is it provided that enterprises with no prior relation to the state industrial sector may be formed as corporations with capital investment funds constituted as shares, and with this taking place in circumstances where private individuals supply all the capital investment and so themselves initiate the establishment of the incorporated enterprises as such. In addition to

the incorporated enterprises that are subject to private ownership rights, the private enterprise sector in the PRC has comprehended enterprises that are based in private capital investment, and subject to private ownership rights, but that are enterprises which do not proceed to incorporation and which, in consequence, do not fall within the sphere of the corporation system and within the terms of regulation set through the Corporation Law. These are the enterprises that have been very much in the vanguard of the private enterprise sector, and it has been a particular concern of the political-administrative authorities to provide for them a legal-regulatory framework that will be exclusive of the principles of share-holding and limited liability which are essential to the law of corporations. Two measures present themselves as foundational in respect of this legal-regulatory framework. First, there is the Partnership Enterprise Law of the PRC, which was adopted at the 24th Meeting of the Standing Committee of the 8th National People's Congress on 23 February 1997.<sup>[15]</sup> Second, there is the statute relating to the private enterprise sector whose elements we now proceed to examine in detail: the Individual-Exclusive Funded Enterprise Law of the PRC, or as we abbreviate this the IEFELaw, which was adopted at the 11th Meeting of the Standing Committee of the 9th National People's Congress on 30 August 1999.<sup>[16]</sup>

## **ii. The Law of the Individual-Exclusive Funded Enterprises of the People's Republic of China**

The Law of the Individual-Exclusive Funded Enterprises of the PRC, or as explained the IEFELaw, comprises forty-eight Articles with these being organized in the form of six separate Chapters. Chapter 1 (Articles 1-7) sets out the general principles which relate to the individual-exclusive funded enterprises (that is, the IEFELaws). In Chapter 2 (Articles 8-15), there are described the arrangements

and procedures that are to be followed in the establishing of IEFEs, and specifically as these concern the issuing by the relevant public authorities to the individuals providing the funding for the enterprises of the business licences which are essential for the purposes of enterprise establishment. Chapter 3 (Articles 16–25) elaborates the rights and duties of the individuals who are the investors in the individual-exclusive funded form of enterprises, together with the rights and duties of the individuals who are commissioned by the investors to discharge the management functions of the enterprises. Chapter 4 (Articles 26–32) describes the arrangements and procedures relating to the termination of IEFEs, and states the basic duties of investors in respect of the dissolution of enterprises and the liquidation of enterprise assets and property. In Chapter 5 (Articles 33–46), there are set down the legal duties and obligations that relate to the IEFEs, and to the different parties involved in them, together with the sanctions and penalties which are to be imposed for breaches of these. Finally, there are two supplementary provisions stated in Chapter 6, with these providing that the IEFEE Law has no application to enterprises in the PRC which are funded through foreign capital investment (Article 47) and that the Law, as enacted on 30 August 1999, would become effective as of 1 January 2000 (Article 48).

### **a. General Principles**

The general principles that are set out in Chapter 1 of the IEFEE Law concern the defining purpose of the Law, the essential characteristics of the individual-exclusive funded category of enterprises, and the basic position in law of the enterprises and their workers. As regards the purpose of the IEFEE Law, it is affirmed in Article 1 that the Law is enacted in order to provide for the proper regulation of the activities of enterprises that are based in individual-exclusive funding arrangements, and, through this, to provide for the proper

protection under law of the legitimate rights and interests of investors and creditors. In addition, it is affirmed that the IEFELaw has the more general, and as it were context-directed, purpose of contributing to the maintenance of the whole containing socio-economic fabric and of promoting the development of the socialist market economic order in the PRC. The purpose here referred to is crucial. For, as we shall emphasize, the terms of the IEFELaw are such that they serve to set the individual-exclusive funded category of enterprises within the context of the socialist market economic order, and with this following from the recognition that is given in the Law to social interests that are bound up with the enterprises which extend beyond the immediate material interests of investors and creditors.

The essential characteristics of the IEFELs, as forming a distinct category of enterprises, are given in Article 2 of the IEFELaw. Thus the IEFELs are enterprises which are established within the territory of the PRC, and which are supplied with their capital investment by single individuals acting in their capacity as natural persons and on a sole and exclusive basis, and with the individuals in question, as investors, standing as the sole and exclusive bearers of ownership rights in respect of the enterprises. Further, the liabilities of investors for the debts of enterprises in the individual-exclusive funded category are unlimited liabilities. Thus it is that, for the purposes of the IEFELaw, there is no distinction allowed for as between the capital assets and property pertaining to the enterprises and the capital assets and property as belonging to investors in their purely private capacity. It is also provided in the IEFELaw that the IEFELs should have a permanent domicile, with the location for this to be where the principal business offices of the enterprises concerned are situated (Article 3).

As for the position of the IEFELs and the enterprise workers in law, the key consideration given recognition to in the general principles of the IEFELaw is that the Law establishes a legal-regulatory



framework for the enterprises that involves, and that gives effect to, determinate legal rights and obligations which relate to the organization and operations of the enterprises. Thus there is stated the requirement that the IEFEs are to act in accordance with standing law and administrative regulations in all aspects of their business activities. It is also required that the IEFEs are to conform with the accepted principles of good faith and honest dealings, to refrain from conduct involving harm and detriment to public interests, and to fulfil all obligations concerning the payment of due taxes as in accordance with law. (Article 4). To balance these obligations, there is laid down the general principle that the state authorities are to enforce the law in matters relating to the IEFEs as regards the protection of the property, and the other legitimate rights and interests, bound up in them (Article 5). In respect of the position of enterprise workers, it is provided that workers are to be employed in the IEFEs in accordance with law, that the rights and interests of the workers are to be protected under law, and that workers are to establish trade union organizations, and to direct their activities, in accordance with law (Article 6). To underline the situating of the IEFEs within the context of the socialist market form of economic order, and to underline also the privileged and legally entrenched position in the PRC of the CPC as the custodian of the socialist road of development, there is stated the general principle to the effect that enterprise workers who are members of the CPC are required to conduct themselves, and to organize their activities, in accordance with the Constitution of the CPC (Article 7).

## **b. The Establishment of Enterprises: Registration and Licensing**

The legal-regulatory framework set for the individual-exclusive funded category of enterprises, then, is one where, at the level of general principles, it is provided that the enterprises are to be subject to law and administrative regulations in the different aspects of

their affairs. However, the terms of the IEFE Law are such that the enterprises are not only required to conform with the terms of the relevant law and administrative regulations. In addition to this, it is required that the enterprises are to have the standing, and the recognition, as distinct legal entities such as to render them capable of conformity with law and administrative regulations in their organization and in their activities and operations. So far as the provisions of the IEFE Law are concerned, the basis for the status of the IEFEs as legal entities relates to the arrangements and procedures that are prescribed for their establishment and licensing, which arrangements and procedures serve to bring the IEFEs under the supervision of the political-administrative authorities and hence under the direct regulatory control and supervision of the state as such.

The essential conditions for the establishing of enterprises as IEFEs according to law are detailed in Article 8 of the IEFE Law as follows. Thus it is here stipulated that investors are to be single individuals and having natural personality as such, and that the enterprises proposed for establishing are each to have a legal enterprise name. There is also stipulated that the investment capital relating to enterprises is to be supplied and declared by the investors, that there is to be a fixed place and location for the conducting of the business activities and operations of enterprises, and that there are to be personnel and workers sufficient for the enterprises to be effective in the performance of their activities and operations.

The conditions for establishing enterprises as IEFEs as referred to above being met, there is then a requirement that investors, or their designated agents, are to proceed to apply for the registration of enterprises and for the issuing of business licences. Thus formal applications are to be drawn up and presented to the registration authorities at the relevant level of local government administration. In the IEFE Law, it is provided that an application for the establishing of an enterprise as an IEFE is to include a document of for-

mal application for establishment, a document certifying the name and status of the investor concerned, and a document confirming permission for the use of the production and operating facilities as intended for the proposed enterprise. In circumstances where enterprise establishment requires the express approval of some or other political-administrative authority, as in accordance with standing law and administrative regulations, then it is stipulated that documents confirming approval as issued by the relevant authority are to be submitted with the application for establishment. (Article 9). The document of application is to include the name and address of the proposed enterprise, the name and address of the applicant investor, a statement of the actual amount of capital investment to be supplied by the investor together with a specification of the means for the raising of it, and a statement as to the precise scope of the projected business activities and operations (Article 10). There is the additional requirement that the name proposed for an individual-exclusive funded form of enterprise is to be consistent with the form of its liabilities, as well as consistent with the form of business which it is to undertake (Article 11).

The registration authorities receiving applications for the establishment of enterprises are empowered to issue business licences to the applicant investors. Under the terms of the IEFE Law, the registration authorities are required to issue business licences to applicant investors within fifteen days of their receipt of applications for establishment. In the event that the registration authorities decline to issue business licences, the applicant investors concerned are entitled to have a written explanation from the registration authorities where the reasons for the decision to withhold business licences are properly elaborated. (Article 12). The issuing of the business licences to applicant investors is the essential act in the acquiring of legal standing and recognition on the part of the enterprises whose establishment is being applied for, as well as its being the essential act in the acquiring by the enterprises of the formal legal capacities

to engage in business activities and operations. Thus it is provided that enterprises are to commence their business activities and operations only subsequent to the issuing of the business licence by the registration authorities, and with the date of issue of the licence marking the first day for engagement in legitimate business activities and operations on the part of the enterprises concerned (Article 13). The central significance of the issuing of the business licence as to the establishing of the enterprises, and as to basing of the legitimacy of their activities and operations, is reflected in the provisions of the IEFE Law to the effect that fundamental alterations made to the structure, functions and other aspects of enterprises subsequent to licensing are themselves required to be applied for and approved by the registration authorities. Thus it is provided that where IEFEs opt to establish subsidiary branches, then applications for the establishing of the subsidiaries, and for the issuing of business licences to them, are to be submitted to the registration authorities in the localities in which the subsidiaries are situated (Article 14). Again, it is provided that changes in those circumstances of IEFEs that were directly material to the original issuing of business licences to them are to be reported to the relevant registration authorities within fifteen days of their being effected, and with this involving the submission of official application forms for the registration of the changes involved (Article 15).

### **c. Enterprise Investors and Management Personnel**

In the legal-regulatory framework set for the individual-exclusive funded category of enterprises, the position of the investors is fundamental with respect to the establishing of the enterprises and to their internal organizational structure. For it is the investors who initiate the establishing of IEFEs, and they who provide the capital investment funding for the enterprises. Thus it is that the IEFE Law stipulates the basic principles concerning the rights and duties

of investors. The essential principle, here, is that individual persons acting as investors remain subject to ordinary standing law and administrative regulations. Accordingly, it is provided that where individuals are expressly prohibited by law or administrative regulations from engaging in profit-making business activities, then such individuals have no competence to act as investors and so are not permitted to make application for the establishment of enterprises (Article 16). There is the further principle that the investors, as suppliers of the capital investment funding for the enterprises on a sole and exclusive basis, are to bear and exercise all ownership rights relating to the enterprises, and that, as the bearers of rights of ownership, the investors in IEFEs are to remain as regards their enterprise liabilities the subjects of unlimited liabilities. Hence investors, as the owners of the enterprises, are competent to dispose of ownership rights in enterprises in favour of other persons through transfer and inheritance, as in accordance with the general rules of law relating to the disposition of personal property (Article 17). In addition, enterprise investors, as the subjects of unlimited liabilities in respect of enterprise debts, are to be considered as committing all those of their assets and property held in common family ownership to the enterprise capital investment funds, and with the common family assets and property of investors remaining available for the discharging of the enterprise debts (Article 18).

In principle, the enterprise investors, as bearers of ownership rights, are eligible to exercise all the rights and powers relating to the management of the enterprises. Even so, the IEFEE Law does give proper recognition, in respect of the individual-exclusive funded category of enterprises, to the distinction between ownership rights and powers, as belonging to investors, and the rights and powers of management. For it is confirmed that investors are eligible to commission personnel to manage the affairs of the enterprises that they own, and with the personnel concerned being authorized to act with full civil capacities in the representing of the interests of owners

through the exercise of management rights and powers. In the event that investors do so commission enterprise managers, then, as it provided in the IEFE Law, the relationship between investors and management personnel is required to be based in a written contract of employment. The terms of the contracts formed by investors and managers are to be such as to specify the business activities and operations that the management officials are commissioned to engage in, and to specify the scope and extent of their authorization to act. The persons commissioned to act as managers remain subject to the general obligations of honesty, good faith and due diligence in the exercise of rights and powers, and they are bound to conduct enterprise business in accordance with the stated terms and provisions of the employment contracts which they enter into with investors. (Article 19).

The managers of the IEFES are subject to certain restrictions on their conduct. Among the restrictions that are explicitly referred to in the IEFE Law are the prohibitions on conduct involving the abuse of position by managers, for the purposes of personal gain and advantage. Thus managers are strictly forbidden from seeking and accepting bribes, embezzling enterprise assets and property, and engaging in the misappropriation of enterprise funds. Likewise strictly forbidden for managers are such practices as the opening of personal bank accounts for the depositing of enterprise funds without the consent of investors, and the use of enterprise assets and property as guaranteed collateral without specific investor authorization. The restrictions imposed in law on the managers of the IEFES also include prohibitions on conduct involving conflicts of interests that are likely to go against the interests of enterprises, and so likely to commit managers to acts of bad faith in respect of investors. Accordingly, it is provided that management personnel are not permitted to undertake business ventures that are competitive with the enterprises that they manage, or to conclude personal contracts and trading arrangements with the enterprises, save in circum-

stances where the approval of investors for this is forthcoming. Nor are management personnel permitted to transfer the trademarks and intellectual property of the enterprises which they act for, or to divulge the business secrets and privileged information of the enterprises. Finally, there is confirmed to be a general duty falling on the management personnel of IEFEs to refrain from acts which are prohibited under the terms of general law and administrative regulations. (Article 20).

The restrictions placed on the conduct of the management personnel of the IEFEs, as stated above, involve duties which are owed to investors and which have the effect of working to protect the interests of investors. However, the IEFE Law also stipulates certain general duties falling on the enterprises, and to be discharged by investors and managers, where these duties are essentially non-investor-focused with respect to the interests which they work to protect. Thus the enterprises are required to maintain accurate financial records (with all that this means in terms of such wider duties as those to do with the taxation system), and with this being expressed in terms of the stipulated requirement that the enterprises are to keep proper accounts and to practise proper accounting in accordance with the law (Article 21). Similarly, there are the duties that are owed by the IEFEs with respect to workers. Here it is provided that the enterprises are required to conclude standard legal form contracts of employment with workers, to maintain proper safety standards for workers, and to ensure the timely and complete payment of the wages and salaries of the workers (Article 22). Also, the enterprises are required to participate in the social insurance programmes established by the state for enterprise workers, and to pay the due social insurance premiums of workers as in accordance with the existing administrative regulations issued by the state authorities (Article 23). As well as duties and obligations, there are certain rights and immunities conceded to the IEFEs under the terms of the IEFE Law. Thus the enterprises are considered compe-

tent to apply for loans and to acquire rights in the use of land, and, more generally, to enjoy such general rights as are defined as applying to enterprises in law and in administrative regulations (Article 24). There is also stipulated the principle as to the exemption of the enterprises from being coerced by any institutions or individuals, so as to provide financial resources, material resources or manpower in any manner which involves the violation of law (Article 25).

#### **d. Terminations: the Dissolution and Liquidation of Enterprises**

The enterprises established as IEFEs are terminable. Thus the IEFE Law provides for the termination of enterprises, and with this involving both the dissolution of enterprises and the liquidation of the enterprise capital assets and property. The arrangements and procedures relating to enterprise terminations, as elaborated in the IEFE Law, are intended to facilitate terminations if opted for by investors in their status as bearers of rights of ownership in the enterprise. However, there is also the clear intention to provide for the proper protection of parties other than investors. In particular, there is the intention to ensure proper protection for the interests of enterprise workers and employees and enterprise creditors, as well as for the interests of the state as the due recipient of enterprise tax revenues.

The principal circumstances that give rise to the initiating of procedures for the dissolution of the individual-exclusive funded form of enterprises, as recognized in the IEFE law, are as follows. First, investors may decide to dissolve enterprises. Second, enterprises may be dissolved following the death of investors or the announcement of the same, but in conditions where there is no legal heir to the ownership rights vested in the enterprises concerned, or where legal heirs, being present, nevertheless waive their right to succeed to the enterprise ownership. Third, enterprises may be dissolved as the result of revocation of business licences in accordance



with law. Fourth, there are such other circumstances occasioning enterprise dissolution as may be defined in law or administrative regulations. (Article 26). The dissolution of enterprises must involve the liquidation of enterprise capital assets and property, and with this working to ensure that the rights and interests of creditors are secured. It is provided in the IEFE Law that the liquidation of enterprises is to be conducted either by the investors of the enterprises concerned, or by an official receiver to be appointed by a People's Court on the application of the enterprise creditors. In the event that liquidation is undertaken by enterprise investors, then the investors are required to give creditors advance notice in writing at least fifteen days prior to formal liquidation, or, where notification of creditors is impossible, a public announcement stating the intention of the enterprise owners to liquidate is required to be issued. As for creditors, these are required to declare their just claims within thirty days counted from the date of their receipt of the notification of liquidation, or within sixty days counted from the date of the public announcement by the enterprise owners of the intention to liquidate. (Article 27). Subsequent to the formal dissolution of enterprises, the original investors in the enterprises as dissolved remain liable for the debts of the enterprises incurred during the period of their actual existence, although liabilities cease in the event that creditors present no claims within a period of five years following dissolution (Article 28).

The liquidation of enterprise capital assets and property, as this comes with the dissolution of enterprises, is to be conducted such as to satisfy the legitimate rights and interests of affected parties who are non-investors, and hence such as to ensure that the investors in enterprises act in conformity with the general principles of honest dealings and good faith. Thus in the IEFE Law, it is stipulated that the capital assets and property of the enterprises are to be liquidated in such a way as to discharge their just debts in the following order of priority. First, the salaries and social insur-

ance premiums of the enterprise workers and employees are to be paid. Second, the obligations falling on enterprises in respect of the payment of due taxes are to be fulfilled. Third, the remaining enterprise debts are to be discharged. (Article 29). During the period of the liquidation of enterprise capital assets and property, the enterprises subject to liquidation are not permitted to engage in ordinary business activities and operations other than those relevant to the liquidation process itself, and the investors are not permitted to transfer or to conceal any of the enterprise capital assets and property (Article 30). In circumstances where the capital assets and property of enterprises are insufficient to discharge the due debts of enterprises such as present themselves for the purposes of liquidation, then the investors are required to discharge the debts in question with their personal property (and with this, of course, being in accordance with the underlying principles of unlimited liability that govern the enterprises which are individual-exclusive funded in form) (Article 31). With the completion of the process of liquidation, the investors of the enterprises concerned, or the official receivers as appointed by People's Courts having jurisdiction, are required to prepare a formal report of liquidation, and to arrange for the cancellation of the licensing registration of the enterprises by the relevant registration authorities within a period fifteen days (Article 32).

#### **e. The Legal Duties and Obligations of Enterprises and Related Sanctions and Penalties**

The legal-regulatory framework for the individual-exclusive funded form of enterprises, as this is set in the IEFE Law, is one where the enterprises, and the investors who bear ownership rights in them and the personnel who are their managers, remain subject to various duties and obligations. However, the subjecting of the enterprises, and the enterprise investors and managers, to duties and obligations that are real, and not merely nominal, must presuppose

the presence and availability of sanctions and penalties sufficient to render the legal-regulatory framework for the enterprises capable of actual enforcement. For only thus will there be some material and objective guarantee as to the proper discharging of duties and obligations on the part of the enterprises and the investors and managers, the proper punishing of breaches of duties and obligations, and the proper provision of effective remedies in the event of the occurrence of such breaches. The sanctions and penalties relating to the various legal duties and obligations falling on the enterprises, and on the investors and managers, are summarized in Chapter 5 of the IEFE Law. The schedule of sanctions and penalties described is one that has application to duties and obligations in law whose breach will involve serious criminal misconduct. Accordingly, it is vital to understand that the ultimate responsibility for the enforcement of the duties and obligations applying to the enterprises, and hence for the enforcement of the entire legal-regulatory framework set in the IEFE Law, is a responsibility that lies beyond the political-administrative authorities that have specific institutional concerns for enterprise affairs, and lies, rather, with the police authorities and with the ordinary judicial machinery which is available through the People's Courts.

The provisions of Chapter 5 of the IEFE Law include the specification of a set of sanctions and penalties that apply principally to enterprise investors, and that have application in contexts which involve fraud, misrepresentation, enterprise failure and improper conduct relating to the registration of enterprises and the issuing of business licences by the registration authorities. Thus it is provided that the submission of false documents, and the adoption of other such fraudulent means, to secure the registration of enterprises will result in an order to effect immediate rectification of the misconduct and to pay fines of up to 5,000 Yuan, and with the option available of concurrent revocation of the business licences issued for enterprises in such circumstances in serious cases (Article 33). The use of

names by investors in connection with enterprise registration that are inconsistent with those notified to the competent registration authorities will result in a rectification order to be acted on within a prescribed time period, together with fines of up to 2,000 Yuan (Article 34).

In the event that the business concerns of enterprises as given in the business licences are altered, or leased out or transferred by the enterprise investors, then the relevant penalty is to take the form of the issuing of rectification orders, the confiscation of all illegal gains accruing from the misconduct concerned, and the imposition of fines of up to 3,000 Yuan. It is provided that with serious cases, the business licences for the enterprises will be revoked. In the event of the forging of business licences, the suspension of the business activities and operations of the enterprises is to be ordered, all illegal gains earned through the fraud are to be confiscated, and fines of up to 5,000 Yuan are to be imposed on the malefactors. In cases where the forging of business licences has the aspect of a crime, then the criminal responsibility of the malefactors involved is to be investigated in accordance with law. (Article 35). The cancellation of business licences is prescribed as the due sanction in circumstances where enterprises fail to initiate their business activities and operations for more than six months following the issuing of licences, or where enterprises have ceased their business activities and operations for more than six months (Article 36). In circumstances where enterprises engage in business activities and operations without obtaining business licences, then the business activities and operations are to cease subject to the issuing of a suspension order and fines of up to 3,000 Yuan are to be imposed. In circumstances where changes are made to enterprises in matters that are subject to registration, but where no formal application for approval for the changes is made to the relevant registration authorities, then the registration of changes will be ordered to have effect within a prescribed period of time and with fines of up to

2,000 Yuan to be imposed should the changes still be left unregistered. (Article 37).

The provisions of Chapter 5 of the IEFE Law, as detailed above, are directed to the maintaining of the effective supervision of the individual-exclusive funded category of enterprises through the agency of the political-administrative authorities. The intention, here, is essentially one to do with ensuring that the state, and the machinery of political administration available to it, will properly and adequately secure the range of public interests which are bound up in the business activities and operations of the enterprises. Even so, there are provisions laid out in Chapter 5, where the intention is to secure and protect the interests of parties other than the state, and specifically so the interests of investors in relation to the enterprise managers, the interests of the enterprise workers and the interests of the enterprise creditors. Thus it is provided that the management personnel of IEFEs who violate the terms of their contracts with investors as the enterprise owners, and to the detriment of the interests of investors, are to assume full civil liabilities for the damages caused (Article 38). It is also provided that the sanctions and penalties prescribed in law are to be imposed in the event that enterprises act in violation of the legitimate rights and interests of the workers, as with the failure to ensure proper conditions for health and safety at work and with the failure to pay the due premiums for the social insurance of workers (Article 39).

There are also various sanctions and penalties relating to the duties and obligations of the management personnel of the enterprises in respect of investors stated in Article 40. These are presented as serving to give effect to the provisions of Article 20 of the IEFE Law, which, as we have seen, concern the abuse of position by enterprise managers, conflicts of interests and matters of bad faith. Thus it is laid down that in cases where management personnel embezzle the capital assets and property of enterprises, or otherwise infringe the property rights and interests of enterprises and

the investors in them, then restitution is to be made and the assets and property involved are to be returned. In addition, it is required that where enterprise managers accrue gains through their unlawful actions, then the illegal gains concerned are to be confiscated. In cases where the malpractice of management personnel constitutes criminal misconduct, then the criminal responsibility of the personnel is to be investigated in accordance with law. (Article 40). The violation of law or administrative regulations in the disposition of the financial resources, material resources and manpower resources of enterprises is to be subject to sanctions and penalties, and the liabilities of the responsible individuals concerned are to be investigated (Article 41). As regards the interests of creditors, it is provided that, in the case of the liquidation of enterprises, those investors who hide or transfer the capital assets and property of the enterprises during the process of liquidation, in order to evade liabilities in respect of creditors, are to be sanctioned. The sanctions prescribed include the retrieval of the capital assets and property concerned according to lawful procedure, and the imposing of the penalties laid down in the law and administrative regulations. Where the misconduct of investors is criminal in nature, then the basis of the criminal responsibility involved is to be investigated. (Article 42). There is the further provision relating to the liabilities of investors to the effect that investors who violate the terms of the IEFE Law, and so render themselves subject to fines or forfeits, are required to discharge all civil liabilities for damages prior to the payment of fines and forfeits in circumstances where their capital assets and property are insufficient to discharge all their just liabilities, or where the capital assets and property of the enterprises are subject to confiscation orders (Article 43).

Under the terms of the IEFE Law, the individual-exclusive funded form of enterprises are regulated principally through the agency of the registration authorities. However, the registration authorities are political-administrative authorities, and, as such,

they are subject to law, with their actions being subject to review in accordance with the various principles and procedures which belong to the province of administrative law as well as those which belong to the province of the ordinary criminal code. So, for example, the registration authorities may err in the exercise of their official powers, or they may abuse or exceed their powers and in this way be found to have acted *ultra vires*. Likewise, the registration authorities may even do material wrong, as through corruption and criminal malpractice in the exercise of powers. In principle, therefore, it is essential that there should be sanctions and penalties available to have applied against the registration authorities, in addition to there being remedies made available for those persons, and particularly the enterprise investors, who have just cause for complaint in regard to flaws and improprieties which may be found to attach to the acts of the authorities.

The duties and obligations of the registration authorities, as these relate to the sanctions and penalties for non-fulfilment, are set out among the provisions included in Chapter 5 of the IEFEL Law. Here, the intention is, in its essentials, one to do with the protecting of enterprise investors, or would-be enterprise investors, from the costs and disadvantages arising from maladministration. Thus it is stipulated that registration authorities that permit the registration of enterprises which fail to satisfy the registration requirements laid down in the law, or, conversely, that decline to make due registration of enterprises which satisfy the specified registration requirements, are subject to sanction as follows: the individual officials involved are subject to penalties under administrative law, or, in cases where the actions of officials constitute the commission of crimes, then the officials concerned are to be investigated for criminal responsibility in accordance with law. (Article 44). Then again, there are the cases where the officials in charge of administrative departments superior to the registration authorities proper compel officials in the latter to permit the registration of en-

terprises which fail to satisfy the due registration requirements. Also, there are the cases where the registration authorities are compelled to refuse the registration of enterprises which satisfy the registration requirements, or where the superior administrative departments attempt to conceal the unlawful registration acts. With these cases, it is provided that the individual officials at fault are to be subject to penalties under administrative law, or are to be subject to investigation for criminal responsibility in the event that their actions constitute crimes. (Article 45). Finally, there are the cases where the registration authorities refuse the registration of proposed enterprises as in line with the application of investors, and yet fail to provide the applicant parties with the due reply with explanation within the time period as prescribed in law. Here, the applicant parties concerned are entitled to seek the appropriate remedies which are available in administrative law. These take the form either of administrative reconsideration by some competent administrative organ, or of judicial review by the courts in accordance with the principles and procedures of administrative litigation. (Article 46).

#### **f. The IEFE Law Considered: Purpose and Effects**

The IEFE Law whose elements we have expounded constitutes the legal-regulatory framework for the establishment, and for the business activities and operations, of enterprises which are based in the capital investment funding of private individuals. The essential purpose of the IEFE Law is to facilitate the direction and commitment of private capital by individual investors to the end of productive enterprise. It is through reference to this its purpose that the IEFE Law is to be viewed as comprising a core component part of the juridical context which has been set by the Party-State leadership for the emergence and organization of the private enterprise sector in the PRC. In fulfilment of the purpose informing it, the IEFE Law



serves to encourage the initiative of private investors and to enable them to act in pursuit of profits. Here, of course, the IEFE Law legitimates the range of private interests that are bound up with profit-making enterprises which remain subject to private capital investment funding arrangements, and subject to rights of private ownership. At the same time, however, the terms of the IEFE Law are such as to link private interests with interests that belong to the sphere of public interests. For the IEFE Law serves to facilitate and to make possible the range of public goods that follow from the presence, and from the proper and efficient functioning, of the specific form of private enterprise to which it has application. Thus there follow from the individual-exclusive funded form of enterprises the remunerative employment of staff and workers, and the provision of sought-for goods and services such as are essential to the needs of the individual members of the community. So also does there follow the generation of the ever increasing yields of tax revenues that, as these accrue to the public authorities, work to the securing of the collective interests and advantages of the whole community as in accordance with the principles of the socialist market economic order, which principles, as it is stipulated in the IEFE Law, set the framework context for the activities and operations of the enterprises.

The purpose of the IEFE Law, as concerning the direction and organization of private capital investment for productive enterprise, is underlined through consideration of the principal effects of the Law. First and foremost, the IEFE Law has the effect that it provides for the extension of proper legal standing and recognition to the enterprises which are formed through the initiative, and through the capital investment funding, of private individuals. Thus there are uniform standards laid down relating to the form that the individual-exclusive funded category of enterprises must assume as the condition for their acquiring standing and recognition in law, and, in accordance with these standards, there are proper protec-

tions and safeguards defined in law with respect to the rights and interests of the individuals who stand as the enterprise investors. At the same time, however, the extending of legal standing and recognition to the enterprises is such that it works to ensure proper protections and safeguards for concerned parties other than investors, and for their rights and interests. Thus it is that in consequence of their acquiring of legal standing and recognition, the enterprises, together with the investors and the management personnel acting for them, remain subject to duties and obligations that are determinate in law, and with the said duties and obligations being owed to the enterprise workers, the enterprise creditors and the state and with this serving to give real effect to the rights and interests of these various parties. The duties and obligations falling on the enterprises, and on the investors and management personnel, touch directly on the range of social interests that it is provided that the enterprises are bound in law to promote, and that are implicit in the ends of the socialist market economic order in contextual relation to which, and to repeat, the enterprises in the individual-exclusive funded category are to be situated. For it is the socialist market economic order that stands as the presupposed background for the social interests which the enterprises based in private capital investment are to serve, as it stands also as the presupposed ground of final justification for those duties and obligations of the enterprises which are rendered properly determinate as the effect of the enterprises acquiring legal standing and recognition.

The IEFE Law involves, and gives rise to, the subjection of the individual-exclusive funded category of enterprises to a comprehensive regime of regulation that is maintained by the state, and by the political-administrative authorities which act for the state. This regime has the effect not only that the enterprises based in private capital investment funding are removed entirely from implication in the condition of absolute non-regulation, such as obtains in the

black market. In addition to this, the regulatory regime of state-maintained supervision, as set in the IEFE Law, has the more substantial effect, such as we have indicated, that the private enterprises are brought to conform with such legal norms and standards as will work to ensure that the private enterprise sector serves the wider public interests of the whole community. The element of the IEFE Law that is central, as regards the state regulation of the private enterprise sector, is that to do with the rights and powers of the political-administrative authorities which concern the registration of the enterprises and the issuing of business licences to their owners. For the registration and licensing of the enterprises by the political-administrative authorities is the precondition for the assignment to them of proper legal standing and recognition. So also is it the precondition for the engagement by the enterprises in fully lawful business activities and operations, and where the enterprises, as acting in conformity with the due principles of honest dealings and good faith, will here reliably discharge their duties and obligations with respect to the provision of stipulated goods and services, and with respect to the rights and interests of the enterprise workers, the enterprise creditors and the state itself.

The enterprise registration and licensing regime maintained by the state, and by the political-administrative authorities, as this is provided for in the IEFE Law is strict. To underline the strictness of the regime, there must be reckoned with the elaboration of the relevant provisions of the IEFE Law that comes in the regulations relating to enterprise registration and licensing which were issued on 13 January 2000 by the State Administration for Industry and Commerce, as the responsible departmental administrative organ of the State Council: Measures Concerning the Registration of Individual-Exclusive Funded Enterprises.<sup>[17]</sup> Among much else, there is here confirmed the hierarchically ordered, and inter-locking, structure of centralized political administration through which are to be discharged the official responsibilities for the registration and

licensing of the private enterprises. Thus it is provided that the State Administration for Industry and Commerce, as the responsible political-administrative authority at the central level of government, will exercise overall direction for the work of enterprise registration on the nationwide basis. As for the industrial and commercial administrative departments established at the various sub-central jurisdictional levels of government, these are to function as the registration authorities in respect of the particular enterprises which are there presented for the purposes of registration and licensing. In addition to confirmation of the institutional disposition of the registration authorities, there is also provision made in the Measures Concerning the Registration of Individual-Exclusive Funded Enterprises for the general strengthening of the regulatory rights and powers of the registration authorities, and with this as further to the terms of the IEFE Law. Thus there are included such specific provisions as those to the effect that the enterprises are to be subject to annual inspection on the part of the registration authorities, and with this to determine the competence of the enterprises to continue with the performance of their specified business activities and operations.<sup>[18]</sup>

The rights and powers relating to the registration and licensing of the individual-exclusive funded category of enterprises, as these are exercised by the state acting through the relevant political-administrative authorities, are regulatory rights and powers. As the effect of the subjection of the private enterprises to these state-exercised regulatory rights and powers, the enterprises are rendered subject also to the form of control structure which is constituted through the presence of a containing system of state laws and administrative regulations. Thus it is that the terms of the IEFE Law are to be understood such that the enterprises, as based in private capital investment funding, are brought not only within the jurisdiction of the political-administrative authorities. At the same time, the private enterprises are brought within the framework of

general law. This framework stands as the context for the regulation of the enterprises by the political-administrative authorities, as it stands also as the ultimate source and justification for the specific rights and powers belonging to the enterprises and for the specific duties and obligations to which they are subject. The general law that has application to the individual-exclusive funded form of enterprises, as this is confirmed and given effect to under the terms of the IEFE Law, comprehends all the principal categories of law which are to be found obtaining in the PRC. Thus there is legislation falling within the sphere of civil and commercial law,<sup>[19]</sup> in addition to legislation falling within the sphere of economic law.<sup>[20]</sup> There is also the legislation that belongs to the categories listed as follows: social welfare law, as witness, for example, the Labour Law of the PRC of 1994;<sup>[21]</sup> criminal law, as witness most notably the relevant provisions of the Criminal Law of the PRC of 1979;<sup>[22]</sup> and administrative law, as witness particularly the Administrative Procedure Law of the PRC of 1989 and the Administrative Reconsideration Law of the PRC of 1999.<sup>[23]</sup>

The framework of laws and administrative regulations that has application to the regulation of the private enterprise sector, and that applies to the private enterprises as an effect of the IEFE Law, goes to confirm what, as we have pointed to, is a salient feature of the post-1978 reform era in the PRC. This is that the reforms in the economic sphere have occasioned significant reforms in the sphere of government and political administration, and with this involving the development of the rule of law as the basis for the general exercise of state powers and as the basis for the organization of the relations of the state, and those of the political-administrative authorities, to the means of industrial production. The extension of legal forms and legal categories to the means of industrial production has been most marked in the context of the state industrial sector. Here, as we have emphasized, the aspect of the development of the rule of law in the PRC that has been crucial has been the establish-

ing of the law of corporations. For it is the law of corporations that has been foundational in the reform of the industrial SOEs, and in the endeavour essential to that reform process of the redefining of the status and position of the industrial SOEs in their relation to the state and to the political-administrative structure.

The law that serves to regulate the individual-exclusive funded category of enterprises is to be distinguished from the law of corporations in certain critical respects, just as the private sector enterprises such as are governed by the IEFE Law are to be distinguished from the state industrial sector enterprises which have come to be established as corporations. The essential point of distinction, here, is to do with the consideration that the incorporated enterprises are based in limited liability, in the matter of the principles relating to their capital investment funding, whereas the enterprises in the individual-exclusive funded category are based in principles of unlimited liability as regards capital investment funding arrangements. Thus the incorporated enterprises stand as commercial corporations where the liabilities of investors, as the bearers of the ownership rights, are limited to the extent of their subscribed capital investment. The principles of limited liability applying to the incorporated enterprises are, of course, connected directly with the application to the enterprises of the principles of share-holding. For the investment capital in the incorporated enterprises is constituted and represented as shares, and with the material liabilities of the investors, as share-holders, being limited to the capital which is actually committed by them for constitution and representation in the form of shares. As for the individual-exclusive funded category of enterprises, there is here by definition no share-holding arrangement for the subscription and constitution of capital investment funds. In consequence of this, there is no share-holder status for the individual investors, as the enterprise owners, to lay claim to in order to insulate themselves in their private capacities from the conditions of enterprise engagement and so limit their enterprise li-

abilities to the material extent of the subscribed share capital. On the contrary, the terms of the IEFE Law provide that the liabilities of the enterprises are to be discharged by the owners up to and including the disposal by them of their personal and their common family property (Articles 2, 18), and with this unlimited obligation on owners, as regards the discharging of enterprise liabilities, coming to have its most compelling application in the context of the dissolution of enterprises and the liquidation of enterprise assets and property (Articles 30–31, 42).<sup>[24]</sup>

The principles of unlimited liability that have application to the enterprises that are governed by the IEFE Law are notable for the reason, among others, that there is underlined with them the determination of the Party-State leadership in the PRC to extend the constraints of the rule of law to the private enterprise sector. In this, the IEFE Law complements the law of corporations, where, and to repeat, the intention and effect have been to bring the state industrial sector within a proper framework of laws. It is clear that the principles of unlimited liability, as set through the IEFE Law, work to impose strict disciplines on private individual investors. For the making of enterprise liabilities unlimited in extent means that private investors are bound in law, and on pain of severe financial sanction, to conform with general standards of honest dealings and good faith, and with this serving as a material deterrent to fraud and malpractice on their part. It means also that investors remain subject to a legal framework where the rights and interests of investors are protected, but where investors are bound to subordinate their rights and interests to those of creditors and employees, and to the underlying claims of the state, in the conducting of enterprise activities and operations. In these respects, the disciplines of unlimited liability, as bearing down on private investors, are such as to promote trust and confidence in regard to enterprise activities and operations within the private sphere, and hence to promote general reliance on the rectitude of the enterprises, and of their owners and

management, in all the various aspects of those activities and operations. At the same time, the private investors are constrained, through the disciplines of unlimited liability, to work to ensure the continuing profitability of the enterprises, and hence to ensure the economic virtue of the enterprises as this is determined through the efficient performance of their designated functions in the provision of goods and services. Here, the subjecting of the private enterprises to the constraints of legal order, as through the application to them of unlimited liability disciplines, is all of a piece with the subjecting of the enterprises to the constraints of the market disciplines, as in accordance with the general reform policy objectives of the Party-State leadership to render the means of industrial production responsive to the market accountabilities.

Beyond this, it must be emphasized that the application of the principles of unlimited liability in the private enterprise sector is such that these serve to maintain the integrity of the whole corporation system in the PRC. As we have explained, the corporation system has stood as the principal institutional framework for the realizing of state industrial sector reform. Thus it is predominantly the industrial enterprises falling under state ownership that have come to enjoy the privileges that are bound up with the limitation of liabilities, as in accordance with the principles of share-holding. Likewise, of course, it is predominantly the industrial SOEs that have come to be seized of the independent legal person status specific to corporations, and hence seized of the institutional attributes essential to that personality. So, for example, the incorporated industrial enterprises give effect in their organization to the distinction between owners in their private capacities and owners as shareholders, and to the representative standing of those management personnel who, like board directors and board chairmen, act as officers for the corporations in their status as public bodies. While the process of incorporation in the PRC has hitherto been a process bound up with the thrust of state industrial sector reform, there is



at the same time no doubt that the status and privileges attendant on incorporation promise much by way of benefits and advantages to those private investors who are engaged in productive enterprises. Indeed, the status and privileges to do with incorporation are such that, in the future, the corporation system in the PRC is likely to be carried forward not just through the incorporation of existing industrial SOEs, but also through the opting for incorporation on the part of private enterprises as governed by the principles of unlimited liability and through the inclusion of such enterprises within the corporate sphere. In view of this, there is a basic requirement, essential for the integrity of the corporate sphere in its future development, that the enterprises drawn from the private sector that present themselves for incorporation should be enterprises whose viability and profitability have been rigorously established. The unlimited liability principles as these apply to the private enterprise sector in the PRC generally, and apply more particularly to the individual-exclusive funded form of enterprises, ensure the element of rigour in the vindicating of enterprise viability and profitability which, as we suggest, must be seen as working to preserve the integrity of the corporate sphere.

### **iii. The Private Enterprise Sector, Principles of Constitutional Order and the CPC Rulership**

The private enterprise sector in the PRC is by no means confined to the enterprises that are individual-exclusive funded in form, and that, as such, are subject to the terms of the IEFE Law whose elements we have examined in this paper. For the private enterprise sector comprehends the enterprises which have the distinct form in law of partnership enterprises. At the same time, the private enterprise sector extends to the enterprises which belong to the corporate sphere. Among these, there are the incorporated enterprises that

originated as enterprises falling within the state industrial sector, and that, through the process of incorporation, have come to have their capital investment supplied entirely by non-state parties and so have come to fall subject to pure and undifferentiated rights of private ownership. There are also the incorporated enterprises that have no origins as such in the state industrial sector, and that stand as enterprise corporations which are not only funded through capital investment supplied by non-state parties, but which are also instituted, and so brought into being, on the initiative of the private individuals who thereby become the sole bearers of ownership rights in them. Despite all this, it is the enterprises based in the exclusive capital investment funding of private individuals that, for the purposes of the present paper, are taken to be representative of the private enterprise sector. For it is the individual-exclusive funded form of enterprises that exemplify, and serve to identify, the characteristics of the private enterprises that have emerged independently of the development track followed with the state industrial sector, and that have stood quite outside the corporation system which, in the particular conditions of the PRC, has provided the state industrial sector with its dominant and defining reform modalities.

The enactment of the law relating to the individual-exclusive funded form of enterprises in 1999 must be taken as confirming the fact of the rise and emergence of the private enterprise sector in the PRC during the reform period. If the private enterprise sector is reviewed for the years of the reform period, then it is clear at once that the sector has developed, and firmly entrenched itself, with a quite astonishing rapidity. That this is so is underlined by the consideration that at the commencing of the reform process in 1978 private commercial enterprise was more or less non-existent in the PRC. As for the origins of what were to emerge as the private enterprises to which legislation such as the IEFEL Law would have application, these go back to the early 1980s when farmers in the ru-

ral areas had public land contracted to them by the governmental authorities, in the relevant jurisdictional contexts, under a system which was designated and referred to as the household contract responsibility system. Here, the contracting farmers were allowed to use their own personal savings to start small business concerns dealing in agricultural produce and agricultural services, and, in doing so, to enjoy levels of remuneration which were linked directly to the performance of the businesses in terms of their actual output and productivity. The small-scale agricultural business enterprises in the rural areas were to prove the initial motor of the private enterprise sector. Thus it was that some of the agricultural enterprises went on to become major private enterprises in their own right. At the same time, the engagement by farmers in profit-orientated trade and commerce encouraged the entering into of the cities and the urban centres on the part of the self-employed small traders and stall-holders, who, as commercial dealers in handicraft products and in agricultural and light industrial goods, laid the foundations for the private enterprises which, as going beyond the agricultural and light industrial sectors, were to operate in the mainstream industrial sectors proper.<sup>[25]</sup>

In the 1980s, there took place a substantial enlargement in the scale of private business concerns and in the scale of investment by private individuals in industrial enterprises. This enlargement continued into the 1990s, so that by the end of the decade the enterprises in the industrial and industrial-related sectors that fell subject to private ownership rights began to account for just less than 10% of the total means of industrial production in the PRC. During this period, it became customary in official usage to distinguish between private enterprises employing more than 8 persons and private individual owned enterprises where fewer than 8 persons were employed, and while the distinction is not in fact pertinent to the terms of legislation such as the IEFE Law, it does nevertheless indicate the increasing scale range of the enterprises falling within

the private sector. The expansion in the number of private enterprises in the 1990s was phenomenal. To give some sense of this, it should be noted that in December 2001 Jing Shuping, the Chairman of the All China Federation of Industry and Commerce, was able to report that as at the time of reporting there were more than 1.7 million private enterprises operating in the PRC, with these involving the investment of capital funds amounting to about 1.1 trillion Yuan together with the employment of about 27 million people.<sup>[26]</sup> Again, the matter may, for the purposes of illustration, be presented in more regional-specific terms, as with the cases of Shanghai and Shandong Province in East China. Thus the latter was in August 2002 reported to have within its jurisdiction some 160,000 registered private enterprises. As for Shanghai, this was reported, also in August 2002, to have something in excess of 205,000 private enterprise concerns, with a registered capital of some 226 billion Yuan and employees numbering some 2 million people and with the private sector as established there accounting for more than 50% of the total of all enterprises.<sup>[27]</sup>

The great expansion in the private enterprise sector has been fully accepted and endorsed by the Party-State leadership in the PRC. This is so not least in relation to the promoting by the leadership of what has been the first-order objective of state industrial sector reform. Here, the private enterprises have been looked to for their contribution to the breaking up of state monopolies and the rendering of the industrial SOEs more adaptable to the market disciplines. At the same time, the private enterprises have been looked to for their contribution in providing an alternative source of employment for the workers who are laid off from the industrial SOEs.<sup>[28]</sup> Thus it is that policy-makers and economic analysts have come to argue for the view that there must be equal treatment for the private enterprises, and with this expressed in terms that imply the necessity of the ending of all existing discrimination in favour of the state industrial sector and to the detriment of the private enter-

prise sector.<sup>[29]</sup>

Very much in line with this view, the private enterprise sector has been moving beyond the industries where it was initially focused, such as farming, forestry, fisheries, animal husbandry, and manufacturing and construction,<sup>[30]</sup> and towards involvement in those areas that have hitherto tended to be the exclusive preserve of the state sector, such as science and technology, real estate, information and education, and financial securities.<sup>[31]</sup> It is expected that the private enterprise sector will now begin to penetrate deeply into the service industries, including banking, insurance, tourism and telecommunications, and with the private enterprises so engaged expanding further in accordance with what is currently projected for the future as a significant growth in general employment in the service industries sector.<sup>[32]</sup> In addition to this, there is little doubt that the private enterprise sector has received, and will continue to receive, very great advantages from the admission of the PRC to the World Trade Organization (WTO) in December 2001. For the private enterprises must inevitably derive considerable long term benefit from the fulfilling of the commitments given by the state-governmental authorities on the occasion of WTO entry. Of particular account, here, is the undertaking on the part of the PRC to fulfil, by the year 2005, the terms of the WTO treaty obligations as to the establishing of uniform administrative rules and procedures for all enterprises in respect of such matters as capital access and commercial operations, and subject only to the interests of the state in maintaining control of the industrial sectors which are designated as essential to the national security.<sup>[33]</sup>

There is a general context for the development of the private enterprise sector in the PRC, and for its continuing expansion, which goes to underline the profound impact that the transition effected since 1978 from the political command economic system to the mixed economic system has had on the entire fabric of state, law, government and society. The context in question is that of a

state structure, and with this including all the available machinery of law and political administration, which is founded in, and legitimated through, the principles of what in the PRC is accepted as authoritative socialist doctrine. Thus the PRC stands as a state that was from the time of its founding in October 1949 dedicated to the realization of the ends of socialist modernization, and as a state that was proclaimed as conforming in its structure and defining purposes with the four cardinal principles which related to the socialist road of development, the democratic dictatorship of the people, the leadership of the CPC and the normative supremacy of Marxism-Leninism and Mao Zedong Thought. The terms of socialist doctrine, as in the case of the PRC, were initially such that it was understood to presuppose the primacy of public ownership of the means of industrial production, where the rights of public ownership pertained to the people and remained vested in and exercised through the state authorities: hence, of course, the preference for, and adoption of, the political command form of economic order. Given this, it was inevitable that the emergence of a private enterprise sector should carry with it highly challenging, and indeed subversive, implications for the integrity of socialist doctrine in the PRC, and that there should in this way be called into question the very fundamentals of the legitimate order established within the PRC. For the private enterprise sector comprises an economic sphere where the means of industrial production are made subject to ownership rights vested in private individuals, and private ownership rights are in principle opposed to, and potentially destructive of, the public ownership regime which in the PRC of the 1950s was made the foundation of its socialist development.

In the event, the Party-State leadership of the reform era has modified certain of the core tenets of socialist doctrine, and this in such a way as to provide for the recognition of the private enterprise sector at the level of the most basic constitutional terms of association in the PRC. In doing so, the Party-State leadership has

moved to provide for the bringing of private enterprise and private ownership rights within the framework of the state constitutional order. The crucial point of documentary reference for this is the 1982 State Constitution of the PRC, which form of the State Constitution continues to stand as the fundamental law of the PRC.<sup>134</sup> As for the modifications of socialist doctrine that are pertinent to the question of the private enterprises and private ownership rights, these are to be found in the Amendments to certain key provisions of the State Constitution which were adopted by the National People's Congress in 1988, 1993 and 1999. The relevant Amendment from 1988 concerned Article 11 of the State Constitution, and this served to give formal recognition in law to the private economic sector and to the rights and interests bound up with that sector. In its original form as of 1982, Article 11 provided that individual economic activities on the part of workers in the urban and rural areas, such as conform with existing legal limitations, are complementary to the socialist public economic order, with the relevant rights and interests to be protected in law and with the activities involved being subject to the administrative control of the state. In the amended form of Article 11 as of 1988, the provisions to do with individual economic activities were retained, but with a new paragraph added which explicitly recognized the private economic sector as such as follows: 'The state permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The state protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy.'<sup>135</sup>

In 1993, there was an important Amendment made to Article 8 of the State Constitution. The significance of this, in the present context, is that the Amendment gave explicit recognition to the household contract responsibility system, with remuneration being linked to actual output and performance, as a legitimate basis for

the organization of productive enterprise in the rural areas within the containing framework of socialist collective ownership. The contract-based system of household responsibility in agricultural production, as we have explained, goes back to the beginnings of what is now the private enterprise sector in the PRC. In view of this, it should be noted that Article 8 in both its original form as of 1982, and in its amended form as of 1993, affirms the right of the farmers belonging to the rural economic collectives to participate in such private, and contract-based, enterprise projects as the farming of the plots of cropland and hill land allotted for their private use, the engaging in household sideline production, and the raising of livestock as subject to private ownership rights.<sup>[36]</sup>

There was a further modification made to Article 8 with the Amendments to the State Constitution that were adopted by the National People's Congress in 1999. This change served to confirm the propriety of the contract-based form of household responsibility system, through the specifying of it as part of a general management system for the rural areas which was to allow for some measure of decentralization in production operations. With that said, the Amendments of 1999 are notable, here, for the reason that there was formal constitutional endorsement given to the diversification in ownership structure that has been essential for the emergence of the private enterprise sector, as well as a specific constitutional endorsement given to the individual-owned and private economic sectors as forming an essential component part of the socialist market economic order. Regarding the issue of ownership structure, the Amendment for Article 6 is crucial. The Article as of 1982 read thus: 'The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of "from each according to his ability, to each accord-



ing to his work".<sup>3</sup> To this was added in the Amendment of 1999 the following confirmation of ownership diversification (and, related to this, diversified distributional modalities) in what was presented as the defining situation of the PRC as being in the first or primary stage in the development towards socialism: 'During the primary stage of socialism, the State adheres to the basic economic system with the public ownership remaining dominant and diverse sectors of the economy developing side by side, and to the distribution system with the distribution according to work remaining dominant and the co-existence of a variety of modes of distribution.' As for constitutional recognition for the private economic sector, this came with the Amendment that provided for Article 11 of the State Constitution in its 1988 form to be revised as follows: 'Individual, private and other non-public economies that exist within the limits prescribed by law are major components of the socialist market economy. The State protects the lawful rights and interests of individual and private economies, and guides, supervises and administers individual and private economies.'<sup>371</sup>

The amending of the State Constitution in the contexts that we have reviewed must be seen as a response to the development of private ownership rights, and, in this aspect, it is something that is clearly indicative of the firm determination of the Party-State leadership in the PRC to create the conditions of legal-political order appropriate for the emergence of the private enterprise sector which is implicit in the presence of private ownership rights. As it happens, the emergence of the private enterprise sector has had an impact on the fabric of law, state, government and society in the PRC that goes far beyond the formal principles of legal-political order which are given in the State Constitution. For the private enterprise sector has impacted directly on the very substance of the political control structure in the PRC. This is so in the respect that the private enterprise sector has come to pose a most profound challenge to the CPC, and to the foundations of its single-party monopoly rulership

powers as these are exercised through the formally constituted system of state government and political administration. Here, it must be emphasized that the monopoly rulership powers of the CPC are of course intimately bound up with, as they are legitimated through, the terms of the socialist doctrine to which the CPC remains avowedly committed. Thus it is that the CPC has the status, as recognized in the principles of the State Constitution, of being the director of the socialist road for development, and the custodian of the will and interests of the people as in accordance with the terms of Marxism-Leninism and Mao Zedong Thought.

Against this, however, there is the establishing of the private enterprise sector in the PRC and the resulting spread of private ownership rights in the means of industrial production throughout society, and with these developments, as we have suggested, rendering problematic the socialist doctrine which founds the CPC rulership. Thus and to repeat the point, the private enterprise sector has stood in certain opposition to, and has come to be increasingly competitive with, the regime of public ownership of the means of production which, in principle, forms an essential component part of that foundational socialist doctrine. In these circumstances, the CPC is now confronted with a situation where there are present within society elements that derive their power and influence from private ownership rights, and that stand as private interests whose existence is not without strain to be reconciled with the core doctrinal principles to which the CPC appeals in support of its legitimacy.

The challenge in this is that if the emerging private interests were to be viewed by the CPC as being in opposition to itself, then, as the private enterprise sector proceeds to expand further, the CPC would find its power base within society eroded as it came to discover itself to be positioned more and more at odds with the actual material course of the development of productive forces. At the same time, however, the comprehending by the CPC of those ele-

ments of society that stand for private interests would appear to carry with it the danger of the adulteration of the very socialist doctrine that secures to the CPC its legitimacy, and in consequence of this the gradual disappearance of the justification for the continuing existence of the CPC in its present form and for the preservation of its monopoly rulership powers. The challenge for the CPC as regards the private enterprise sector is plainly a substantial one. For the private enterprise sector comprises not only the smaller scale private enterprise owners of the sort who are the standard and conventional subject-matter of the IEFEL Law. In addition, there are also present in the private enterprise sector leading entrepreneurs who have come to rank among the richest and most powerful men and women in the PRC. Further to this, it must be observed that the private enterprise owners, including the more successful of the entrepreneurs in terms of wealth and influence, are now viewed as forming a distinct and permanent part of the social order in the PRC, as witness the recognition that has in recent times been extended to them as one of the major strata of society.<sup>[38]</sup>

As it happens, the CPC of the post-1978 reform era has been prepared to accept both the principle, and the reality, of the private enterprise sector with respect to the substance of its founding socialist doctrine. Indeed, the acceptance of private enterprise is everywhere presupposed in the commitment of the leadership elites in the CPC after 1978 to the establishment and development of the socialist market economic order, as the form of economic order that is prescribed as embodying the instrumentalities which are most conducive to the ends of socialist modernization. For, as we have seen, the socialist market economic order, as this has been developed in the PRC during the reform era, is an economic order that has been bound up not only with the extension of market disciplines to the means of industrial production. As well as market disciplining, there has been the basing of the means of industrial production in a mixed or diversified regime of ownership rights, where public own-

ership rights are recognized to stand in co-existence with private ownership rights of the kind such as point to the necessity of private enterprise organization. This diversified regime of ownership rights, as between the public and private spheres, is endorsed by the Party-State leadership as essential for the realization of socialist modernization, and, as we have noted in connection with the Amendments to the State Constitution, the diversification in ownership rights stands as a distinguishing feature of the primary stage in socialism in which, as it is maintained by the leadership, the PRC is at present situated in the overall unfolding of its socialist development.

The project of the establishing of a market economic order with diversified ownership rights under socialism is regarded in the PRC as the distinctive contribution made by the CPC to the development of the cause of socialism in the modern world. Thus it is this project that serves to define the main substantive element of the socialism that is presented by the Party-State leadership as the socialism adapted to the particular conditions of the PRC, or, as it is generally termed and referred to, socialism with Chinese characteristics. The theoretical elaboration of the framework principles of socialism with Chinese characteristics, and of those of the socialist market economic order, was the signal achievement of Deng Xiaoping, who ranks, of course, as the supreme architect within the Party-State leadership of the reformist strategies for socialist modernization which have been followed since 1978. To underline the central role of Deng Xiaoping in the theoretical formulations relating to socialism with Chinese characteristics, and to underline also the justification carried within those formulations for private ownership rights and thus for the private enterprise sector as consistent with the ends and instrumentalities of socialism, there is the formal recognition that has been accorded in the PRC to Deng Xiaoping Theory as an extension of Marxism-Leninism and Mao Zedong Thought and hence as standing as an essential component part of the socialist

doctrine which is adhered to by the CPC. Thus Deng Xiaoping Theory has been so recognized within the terms of the Constitution of the CPC since the time of the 15th National Congress of the CPC in September 1997, as it is now recognized also in the Preamble to the State Constitution of the PRC as in accordance with the Amendments to the Constitution which were adopted in 1999 by the National People's Congress.<sup>[39]</sup>

From the standpoint of Deng Xiaoping Theory in its classic form, it must be emphasized, rights of private ownership in the means of industrial production were to be considered legitimate in instrumental terms as regards the advancement of the ends of socialist modernization. In this respect, certainly, private ownership rights and hence also the private enterprise sector have come to be taken as acceptable to the CPC at the level of its foundational socialist doctrine. If, however, there was present in Deng Xiaoping Theory the necessary doctrinal warrant provided for the acceptance by the CPC of the private enterprise sector as such, there was still left unresolved a crucial difficulty for the CPC which arose from the existence of that sector. This was to do with the matter of the acceptance of the private enterprise owners for membership of the CPC, and of their participation in the political authority structure in the PRC as this is based in the monopoly rulership powers exercised through the CPC. The projected solution for the difficulty has come with the new contribution to socialist doctrine in the PRC, as proposed and expounded since February 2000 by as now soon to be retiring President Jiang Zemin, and known as the theory, or as it is more accurate the important thought, of the Three Represents.<sup>[40]</sup> The thought of the Three Represents stands as a major development in the theoretical formulation of the principles of socialism with Chinese characteristics. As such, it is to be found appealed to in recent source materials for public policy and administrative regulation in the PRC, while it is at the same time a line of thought which has now been fully accepted on an official basis by the Party-

State leadership.<sup>[41]</sup> Thus there is the formal endorsement of the thought of the Three Represents, together with its inclusion in the Constitution of the CPC, as took place at the 16th National Congress of the CPC which was held in Beijing from 8 November to 14 November 2002.<sup>[42]</sup>

The principles essential to the thought of the Three Represents are principles of representation, and with these having application to the CPC in regard to the basis of its monopoly rulership powers. In specific terms, it is proposed that the CPC represents, and is to be conceived of as representing, the development trend of the advanced productive forces in the PRC, the orientation of the advanced culture of China, and the fundamental interests of the overwhelming majority of the Chinese people. As it is evident from the relevant Party-State source materials, the formulation of the three principles applying to the representative functions and capacities of the CPC has come about as a consequence of the success of the socialist market economic order during the 1990s. In more particular terms, here, the thought of the Three Represents has been formulated in response to the profound changes that have been effected within Chinese society through the successful establishment of the socialist market economic order, and through the enormous increase in wealth and prosperity which this has served to generate.

Among the principal factors bound up with the success of the socialist market economic order, as these are pointed to in the Party-State source materials, the one that stands out most prominently is that of the emergence of the new social classes or strata in the PRC. The new social strata to which particular reference is made include the technical and managerial staff of the non-public sector enterprises, the technical and managerial staff of foreign-funded enterprises, the self-employed business people, the free-lance professionals and, to repeat and of vital significance for us here, the stratum of the private entrepreneurs or private enterprise owners. These various social strata are now recognized to have contributed,

and to be contributing, to the positive development of the productive forces in the PRC, and in this to be working together with the traditional revolutionary classes, such as the workers, the farmers and the CPC officials, in the common cause of building socialism with Chinese characteristics. Hence it is proposed that the CPC should be prepared to accept for its membership the most outstanding individuals drawn from the new social strata. The intention, here, is that through the broadening of the composition of its membership in terms of the social classes, the CPC will much more adequately represent the advanced productive forces and the advanced culture in the PRC and the interests of the greater number of the Chinese people whose well-being and prosperity, as it is maintained, are promoted by the new social strata through their practical working contribution. The issue of CPC membership is critical from the standpoint of the thought of the Three Represents, and it is one that has been settled decisively in favour of the private enterprise owners, and the other new social strata, through the relevant Amendment to the CPC Constitution as adopted at the 16th National Congress of the CPC.<sup>[43]</sup>

The acceptance on the part of the CPC of the new social strata, as within its framework of representative functions and powers, is an event in the course of socialist modernization in the PRC which carries with it immense prospective significance. This is so not least in respect of the acceptance by the CPC of the private enterprise owners as eligible for its membership. Thus the accommodating of the private enterprise owners by the CPC goes to underline the hard and undeniable fact of the emergence of the private enterprise sector as a major force within society. Likewise, there is underlined the inescapable necessity for the CPC of its acting to include the private enterprise sector within the formal organizational structure through which it directs the institutional fabric of government and political administration, and with this as a precondition for the CPC preserving a proper foundation for its continuing rulership within

the prevailing disposition of the social classes and productive forces. However, the question still remains as to whether, and if so to what extent, the inclusion of the private enterprise owners within the CPC organizational structure, as in accordance with the principles given in the thought of the Three Represents, involves some adulterating of the socialist doctrine which serves to endow the CPC rulership with its legitimacy. The answer to this question, as at the level of pure formal doctrine itself, is absolutely clear. This is that there is nothing at all about the adoption of the thought of the Three Represents, or about the acceptance of the private enterprise owners, that is understood by the Party-State leadership to indicate an abandonment by the CPC of its defining commitment to the ends of socialism and socialist modernization. Further to this, there is nothing here to indicate some reconciliation on the part of the CPC with those systems of political and economic order, such as capitalism and social democracy, that, for the CPC, are in strict doctrinal terms associated with the trends running towards bourgeois liberalization which have traditionally been viewed as standing in theoretical and practical opposition to socialism.

As the evidence for this, it is to be emphasized that the Constitution of the CPC, in its amended form as of November 2002, affirms that the fundamental task for the CPC lies in the building of socialism with Chinese characteristics, as indeed it affirms also that the realization of communism stands as the supreme ideal and final objective of the CPC as a party organization. Then again, there are the four cardinal principles of the socialist road of development, the democratic dictatorship of the people, the leadership of the CPC and the normative supremacy of Marxism-Leninism and Mao Zedong Thought, which principles are still clearly affirmed as the basis for the pursuit of socialist modernization and for the resisting of all forms of bourgeois liberalization. To be sure, the thought of the Three Represents is intended to mark a novel and innovative line of doctrine for the CPC. However, it is a line of doctrine that remains



socialist in character, since it remains essentially derivative from Marxism-Leninism and Mao Zedong Thought. Thus the thought of the Three Represents is proposed as an extension and elaboration of Deng Xiaoping Theory, and with the latter being presented as a continuation and development in changed historical conditions of the core of Mao Zedong Thought considered as an application of the basic tenets of Marxism-Leninism to the actual concrete circumstances of China.

So far as concerns the programmatic direction of the Deng Xi-  
aoping Theory to which the thought of the Three Represents re-  
lates, this, of course, lies with the building of socialism with Chi-  
nese characteristics. As we have seen, the particular modalities for  
socialism with Chinese characteristics, as prescribed within Deng  
Xiaoping Theory, are those to do with the project of the establishing  
of the socialist market economic order, and it is very much the com-  
plex effects and consequences of this project, in terms of social and  
economic diversification, to which the thought of the Three Repre-  
sents is offered as a response and a resolution. The effects and con-  
sequences of the socialist market economic order include, centrally,  
the emergence of the new social strata, and this has no doubt gone  
against the strict egalitarianism implicit in socialism through its  
serving to bring about significant and widening inequalities in the  
distribution of income and property holdings among the different in-  
dividuals and groups within society. In the event, the inequalities in  
incomes and property holdings as occasioned by the developing of  
the socialist market economic order, and as reflected in the emerg-  
ing of the new social strata, are endorsed as legitimate within the  
framework of the thought of the Three Represents. However, this  
endorsement of distributional inequalities is not to be taken as sub-  
versive of the principles of socialism from the standpoint of the  
thought of the Three Represents, or as obstructive of the ends of so-  
cialist modernization. On the contrary, the distributional inequali-  
ties following from the socialist market economic order are for the

purposes of the Three Represents to be considered as socialist-consistent, in the sense of their being strategic-virtuous in relation to the furthering of the building of socialism with Chinese characteristics in what remains the primary stage of socialism. Thus these are inequalities that are viewed as being bound up, in some inevitable sense, with the advanced productive forces whose unfolding stands as critical to the primary stage of socialism, and, as such, as being bound up with the generation of the increased overall wealth and prosperity within society that, in the thought of the Three Represents, stands as being in the fundamental interests of the overwhelming majority of the Chinese people which it falls to the CPC to represent, in its status as the director of the socialist road of development.

It is clear from this that the inclusion of the new social strata within the organizational structure of the CPC, as in accordance with the representative functions now assigned to the CPC, is something that the Party-State leadership in the PRC regards as consistent with socialist doctrine and as conducive to socialist modernization. To go beyond the terms of pure formal socialist doctrine, however, there is still to be considered the matter of the actual practical impacts that the inclusion of the new social strata is likely to have for the CPC, and for its standing in relation to the structure of state and society in the PRC. This matter is of very great consequence as concerns the position of the private enterprise sector, and the involvement of the private enterprise owners within the CPC organizational structure. For the private enterprise owners control, and will continue to control, vast holdings in wealth and property, and for them the privileges of CPC membership offer substantial institutional opportunities for the entrenching of their interests as vested interests, and for the utilization of the full political machinery of the CPC monopoly rulership to preserve and legitimate these vested interests. In this, there is the very strong possibility that the CPC rulership will become increasingly the servant and instrument of

private interests, and that, contrary to the principles contained in the thought of the Three Represents, the CPC will become increasingly placed in an ambivalent relation to the fundamental interests of the majority of the Chinese people. The danger, here, is that the ascendancy of private interests will in the fullness of time detract from the legitimacy of the CPC, as based in socialist doctrine, and so in the end will fatally impair the rulership control that the CPC exercises over state and society and with this to the detriment of overall social and political stability. The danger that is posed for the social and political order, as subject to CPC rulership, through the rise of the private enterprise sector is a real and urgent one. In response to this consideration, there are two principal factors that, as we would suggest, are to be drawn attention to in qualification of any such view of the private enterprise sector as something that of necessity carries with it subversive implications for the CPC, and for the fabric of state and society in the PRC.

The first factor is that of the persistence of state ownership control of substantial parts of the means of industrial production in the PRC, and with this forming the context in which the private enterprise sector has emerged in the reform era and in which it will go on to develop and expand in the future unfolding of socialist modernization in its primary stages. In this connection, it is vital to understand that the private enterprise sector has emerged, and the private enterprise owners come to have inclusion in the CPC organizational structure, only within the framework of the socialist market economic order where public ownership rights of the means of industrial production are recognized to co-exist with structures of private ownership rights. As it happens, there is in this very much more than the mere fact of the co-existence of public and private ownership rights. For, as it is affirmed in the source materials for the 16th National Congress of the CPC, the socialist market economic order in the PRC is, and will continue to remain, based in the principle of the dominance of the public economic sector as rela-

tive to the non-public economic sectors.

The economic sector in the PRC that is primarily subject to public ownership rights is, of course, the state industrial sector. As we have explained, the years since 1978 have seen reforms being effected to the state industrial sector involving diversification in capital investment funding, and hence diversification in ownership rights, as between the state and non-state parties. The main element of this has comprised the introduction of the corporation system, where the industrial SOEs are established as corporate entities based in principles of share-holding and limited liability. However, there have also been established within the general corporation system certain institutional frameworks for the state industrial sector reform where the purpose has been to consolidate, and to maintain, strict state ownership control with respect to the parts of the means of industrial production which are held to be strategic as relative to the defining national interests of the PRC. Foremost among these institutional frameworks are the state-exclusive investment form of incorporated industrial enterprises and the parent-subsidiary corporate organizational structures, such as were treated of in Part 1 of the present paper. The control that the state exercises over the means of industrial production, as through the available institutional frameworks for its continuing ownership of the same, is immense, and it serves to set the limiting parameters for the forward expansion of the private enterprise sector. To be sure, the private ownership of the means of industrial production in the PRC will enlarge itself, and, in doing so, it will drive forward the growth of the socialist market economic order. Nevertheless, there is no reason to suppose that the enlargement in private ownership will lead to the overthrow of the citadels of the strategic industrial sectors where state ownership is entrenched. Even less is there reason to suppose any preparedness on the part of the Party-State leadership to permit the overthrow to happen, and this notwithstanding the adoption by the CPC of the thought of the Three Rep-

resents. Indeed, the Party-State leadership in the PRC always has ready to hand the hard core of socialist doctrine that bases the legitimacy of the CPC, and this, in principle at least, provides residual warrants for the reassertion by the state of public ownership control over the non-public economic sectors themselves in the event that changing political circumstances, domestic or international, should dictate the necessity of it.

The second factor to do with the impact of the private enterprise sector for the fabric of state and society in the PRC, as has to be considered, is that concerning the effects that follow, and will continue to follow, for the regulation of the private enterprise sector from the inclusion of the private enterprise owners within the organizational structure of the CPC. In this matter, the crucial consideration is that the inclusion of the private enterprise owners within the CPC organization, as in accordance with the terms of the thought of the Three Represents, will work to strengthen the machinery of government and political administration for the regulation of the private enterprise sector, as it will work also to strengthen the overall control which is exercised through the state-governmental and the CPC institutions with respect to the means of industrial production. In explanation of this, it is to be accepted, at once, that the inclusion of the private enterprise owners enlarges the scope of their power and influence, and with this such as to enable them to act to promote interests which are by definition private in character. At the same time, however, it is to be emphasized that the private enterprise owners are subjected to significant constraints and restrictions on their actions, through the very terms and conditions of their inclusion within the CPC organization. For CPC membership effectively brings the private enterprise owners within an organizational structure which, in principle, exists and functions only to serve and fulfil public purposes. Thus it is that the private enterprise owners, as CPC members, will be subjected to and involved in the CPC agencies at all the various levels of govern-

ment and political administration in the PRC. As for the effects of this, there will no doubt come with time a progressive empowerment of the CPC agencies such as to ensure the monitoring and rooting out of corruption on the part of the private enterprise owners, to ensure their full implication in the formulation of public policy, and, in the most general terms, to ensure that the private enterprise sector will be directed towards the ends of the socialist market economic order.

The effects of CPC membership for the private enterprise owners, as noticed here, are very much bound up with the underlying thrust of public policy as regards the private enterprise sector which we examined in Part 2 of this paper, as in connection with the individual-exclusive funded form of enterprises. This, of course, is all to do with the development of an appropriate legal-regulatory framework for the private enterprise sector. The framework, as we analyzed its basic elements, is one where the private enterprise undertakings are endowed with determinate institutional form and determinate legal status, and where the private enterprises and their owners are so authorized through law and legal procedures that they are in consequence of this made the bearers of the entire range of the rights and obligations which have application to them in general law. As for the constructing and the enforcement of the framework of laws that apply to the private enterprises, this is the concern and responsibility of the institutions of government and political administration in the PRC, and so, inevitably, these institutions are themselves only strengthened through the fact of the extension of law and the constraints of legal order to the private enterprises as these form an integral part of the means of industrial production. In the particular circumstances of the PRC, the institutional arrangements of government and political administration comprise not only the state institutions, but also the institutions of the CPC. Given the political-administrative functions and powers that pertain to the CPC organizational structure, then it is to be reckoned that

the involvement of the private enterprise owners in the CPC organization, as in accordance with the principles elaborated in the thought of the Three Represents, is something that will serve to complement the state institutions in the strengthening of the overall governmental and political-administrative apparatus of control over society and the economic sphere. Here, certainly, it must be said that with the control of the means of industrial production, as with the organization of government and political administration, the CPC and the state stand, and are set to continue to stand, as one, and that regarding the means of industrial production the unitary control as exercised by the CPC and the state is now set to extend itself with respect both to the public economic sector<sup>[44]</sup> and to the private economic sector.<sup>[45]</sup>

The persistence of state ownership of the means of industrial production, and the strengthening of the machinery of government and political administration through the inclusion of the private enterprise owners as members of the CPC: these are factors that must encourage us to view the future for the PRC as one where the emergence of the private enterprise sector, and the spread of wealth and property holdings subject to private ownership rights, will do no fundamental damage to the structure of state and society and to the structure of the CPC rulership. Even so, it is as well to conclude the present paper with a note of caution as regards the prospects for the PRC, and for the as now established course for its socialist modernization.

To repeat the point, the dangers that follow for the social and political order, and for the CPC rulership, from the expanding of the private enterprise sector are real and urgent, as indeed they are widely recognized to be such by Party-State policy-makers, independent analysts and the general public in the PRC. Central among these dangers, as focused on by commentators, is the erosion of public confidence in the CPC rulership in consequence of the rapid increase in the rate and scale of crimes of economic corruption. The

problem, here, is not limited to the utilization of the CPC organizational structure in defence of the vested interests of the private enterprise owners, as these have now come to be admitted for CPC membership. For there is, in addition to this, the utilizing by the Party-State officials of the rulership organization of the CPC to maintain and enlarge their own private wealth and property holdings, and to do this most particularly in regard to the vast amounts of private wealth and property holdings which have been amassed by them through their involvement in the process of political and economic reform itself. The incidence of economic crimes on the part of Party-State officials must obviously diminish the credibility, and the legitimacy, of the CPC rulership in the longer term, and it serves to implicate the institutions of government and political administration in the PRC in what is now perceived by large numbers of the ordinary people to be a systematic corruption of public interests in favour of private interests. The corrupting of government and political administration in the PRC through the practices of Party-State officials in the economic sphere may well prove to be fatal for the CPC rulership, at least so far as concerns the continuation of the basis of the consensual support for it among the majority of the people such as is proposed for the CPC in the thought of the Three Represents. In the event that the authority of the CPC rulership organization should in the future come to be fractured through the forfeiting by the CPC of its popular mandate, then there must be little doubt that a very prominent place in the explanation for this will be occupied by the story of the rise of the private enterprise sector, and by the story of the ready accommodations that have been entered into with the new private interests on the part of the present Party-State leadership.<sup>[46]</sup>



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Notes and References

This paper was completed on 14 January 2003. The reader is advised that the paper takes no account of any changes to the legal and administrative framework for the individual-exclusive funded enterprises, or to the legal and administrative framework for the private enterprise sector in the PRC generally, which may have been made during the period falling between the time of the completion of the paper and the time of its publication. Charles Covell and Shahzadi Covell.

1. In this paper, references to primary and secondary source materials are kept to a bare minimum. This is so particularly with regard to the account of the state industrial sector reform in the PRC that is provided in Part 1 of the paper. For detailed, and fully source-rendered, treatment of the different aspects and dimensions of the state industrial sector reform, as these are attended to here, see: Shahzadi Covell, 'The Reform of the State-Owned Enterprises and its Impact upon the Chinese Political-Administrative System, since 1978', *East Asian Area Studies*, 4 (July 1997), pp. 27-45; Charles Covell and Shahzadi Covell, 'The State Council and Administrative Law in the People's Republic of China', *Jurisprudentia*, 6 (March 1999), pp. 1-49; Shahzadi Covell: 'The Structure of the Communist Party of China and its Control of the Government and the Industrial State-Owned Enterprises in the People's Republic of China', *International Political Economy*, 6 (September 2000), pp. 63-91; *The Reform of the Industrial State-Owned Enterprises and its Impact on the Political-Administrative System in the People's Republic of China since 1978*, PhD Dissertation in International Political Economy (Tsukuba, Japan: Graduate School of International Political Economy, University of Tsukuba, March 2001), in 2 Volumes, pp. 866; 'The Internal Organizational Structure of the Industrial State-Owned Enterprises in the People's Republic of China: 1949-1986', *Tsukuba University Journal of Law and Political Science*, 31 (September 2001), pp. 73-155; *The Corporation System in the People's Republic of China in its Practice and Operation: The Parent-Subsidiary Corporate Organizational Structure and the Framework for State Industrial Sector Reform*, IPE Monograph No. 1, Monograph Series in International Political Economy: The Doctoral Program in International Political Economy, University of Tsukuba (Tsukuba Science City, Japan: January 2002), pp. 173; 'The Corporation System, Corporation Law and the Reform of the Industrial State-Owned Enterprises in the People's Republic of China', *Historia Juris*, 10 (March 2002), pp. i-xl.

2. As regards the principles of political and economic reform advocated at the 3rd Plenum of the 11th Central Committee of the CPC, see: Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China (Adopted on 22 December 1978), *Peking Review*, 52 (29 December 1978), pp. 6-16.

3. For the statement of position on this matter by the Party-State leadership, see: Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China, p. 11.

4. Concerning the view taken by the Party-State leadership as to the reform priorities for the state industrial sector, see: Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China, p. 12.

5. The source for the laws and administrative regulations of the PRC that we refer to in this paper from the period prior to the early 1990s is *Zhonghua Renmin Gongheguo Fagui Huibian*, or, as here translated, *The Compilation of the Statutes of the People's Republic of China*. This work is cited hereafter as *Compilation*. The source for the laws and administrative regulations of the PRC that we refer to from the period that begins in the early 1990s is *Zhonghua Renmin Gongheguo Guowuyuan Gongbao*, or, as here translated, *The Gazette of the State Council of the People's Republic of China*. This work is cited hereafter as *GSC*. The official titles of the legal materials drawn from both sources are given first in English and then in Chinese phonetics, with both the English translations and the Chinese phonetics versions being the authors'.

6. Decree No. 3 of the President of the People's Republic of China. Industrial State-Owned Enterprise Law of the People's Republic of China. *Zhonghua Renmin Gongheguo Zhuxi Ling* (di 3 hao). *Zhonghua Renmin Gongheguo Quanmin Suoyouzhi Gongye Qiye Fa. Compilation*, January-December 1988, pp. 721-34.

7. The details of the Corporation Law of the PRC in its original form as of December 1993, and in its revised form as of December 1999, are as follows: Decree No. 16 of the President of the People's Republic of China. Corporation Law of the People's Republic of China. *Zhonghua Renmin Gongheguo Zhuxi Ling* (di 16 hao). *Zhonghua Renmin Gongheguo Gongsì Fa*.

GSC, 26 January 1994, Issue No. 30 (1993), Serial No. 748, pp. 1414-51.  
Decree No. 29 of the President of the People's Republic of China.  
Decision of the Standing Committee of the National People's Congress on  
Revising the Corporation law of the People's Republic of China.  
Corporation Law of the People's Republic of China.  
Zhonghua Renmin Gongheguo Zhuxi Ling (di 29 hao).  
Zhonghua Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai  
Zhonghua Renmin Gongheguo Gongsì Fa de Jueding.  
Zhonghua Renmin Gongheguo Gongsì Fa.  
GSC, 20 January 2000, Issue No. 2, Serial No. 956, pp. 25-46.

8. Concerning the meetings of share-holders for the limited liability corporations and the joint-stock corporations, see respectively Articles 37-44 and Articles 102-111 of the Corporation Law.

9. On the boards of directors for limited liability corporations and those for joint-stock corporations, see respectively Articles 45-49 and Articles 112-118 of the Corporation Law. On the office of general manager for the two forms of corporation, see Article 50 and Article 119.

10. Regarding the supervisory committees to be established for the limited liability corporations and the joint-stock corporations, see respectively Articles 52-54 and Articles 124-128 of the Corporation Law.

11. Concerning the consultation rights of the representative officials of the workers' organizations in the limited liability corporations and the joint-stock corporations, see respectively Articles 55-56 and Articles 121-122 of the Corporation Law.

12. The place of the CPC committees in the organizational structure of the incorporated enterprises is recognized in Chapter 1, Article 17 of the Corporation Law.

13. Regarding the arrangements for the exchange and transfer of shares in limited liability corporations, where the first-option purchase rights and privileges of existing share-holders are affirmed, see Article 35 of the Corporation Law.

14. For the details on the boards of directors of the SEICs, see Articles 66 and 68 of the Corporation Law. Regarding the general managers, see Ar-

ticle 69.

15. Decree No. 82 of the President of the People's Republic of China.

Partnership Enterprise Law of the People's Republic of China.

Zhonghua Renmin Gongheguo Zhuxi Ling (di 82 hao).

Zhonghua Renmin Gongheguo He Huo Qiye Fa.

GSC, 20 March 1997, Issue No. 6, Serial No. 858, pp. 214-24.

16. Decree No. 20 of the President of the People's Republic of China.

Individual-Exclusive Funded Enterprise Law of the People's Republic of China.

Zhonghua Renmin Gongheguo Zhuxi Ling (di 20 hao).

Zhonghua Renmin Gongheguo Geren Duzi Qiye Fa.

GSC, 14 October 1999, Issue No. 32, Serial No. 959, pp. 1397-1403.

17. Measures Concerning the Registration of Individual-Exclusive Funded Enterprises (Geren Duzi Qiye Dengji Guanli Banfa): Decree No. 94 of the State Administration for Industry and Commerce of the People's Republic of China, 13 January 2000. For discussion and explanation of the Measures, see: *Renmin Ribao (People's Daily)*, 20 January 2000, p. 2.

18. As regards the authority of the State Administration for Industry and Commerce, and that of the industry and commerce departments at the sub-central levels of government, in relation to enterprise registration and licensing, and as regards the rights and powers of the registration authorities in relation to the annual inspection of enterprises, see Article 4 and Articles 29-30 of the Measures Concerning the Registration of Individual-Exclusive Funded Enterprises.

19. It should be noted, in this connection, that the terms of the IEFE Law are of course fully consistent with the basic principles of civil law, as these are to be found set out in the General Principles of the Civil Law of the PRC. Here, the fundamental consideration is that the investors in the individual-exclusive funded category of enterprises have the status of natural persons, and that in consequence of this the investors, and the enterprises that they establish, possess civil capacity and bear all the various rights and obligations which are essential to that capacity from the standpoint of general civil law. So, for example, the investors, and the enterprises subject to their ownership, are bearers of the rights and obligations relating to property and to the forming of contractual relations.

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As a specific case of this, there is the Contract Law of the PRC, which has direct application to investors and enterprises with regard to those of their commercial dealings with other parties as are based in contractual agreements, and which, in this particular context for its application, serves to define and to underline the rights and interests of enterprise creditors such as are referred to in the IEFE Law. The General Principles of the Civil Law was adopted at the 4th Session of the 6th National People's Congress on 12 April 1986, while the Contract Law was adopted at the 2nd Session of the 9th National People's Congress on 15 March 1999. The reference details for these legal source materials are as follows:

Decree No. 37 of the President of the People's Republic of China.

General Principles of the Civil Law of the People's Republic of China.

Zhonghua Renmin Gongheguo Zhuxi Ling (di 37 hao).

Zhonghua Renmin Gongheguo Min Fa Tongze.

*Compilation*, January-December 1986, pp. 1-34.

Decree No. 15 of the President of the People's Republic of China.

Contract Law of the People's Republic of China.

Zhonghua Renmin Gongheguo Zhuxi Ling (di 15 hao).

Zhonghua Renmin Gongheguo Hetong Fa.

GSC, 19 April 1999, Issue No. 11, Serial No. 938, pp. 388-436.

20. In Article 21 of the IEFE Law, it is stipulated that the individual-exclusive funded form of enterprises are required to keep proper accounts, and to practise proper accounting procedures in accordance with law. The effect of this stipulation is to confirm, and to underline, the subjection of the enterprises to the general provisions of the Accounting Law of the PRC. The Accounting Law was originally adopted at the 9th Meeting of the Standing Committee of the 6th National People's Congress on 21 January 1985, and it was subsequently revised in accordance with a Decision adopted at the 5th Meeting of the Standing Committee of the 8th National People's Congress on 29 December 1993. The Law was adopted in its revised, and now authoritative, form at the 12th Meeting of the Standing Committee of the 9th National People's Congress on 31 October 1999 (and to be effective as of 1 July 2000), with the reference for it in this form being as follows:

Decree No. 24 of the President of the People's Republic of China.

Accounting Law of the People's Republic of China.

Zhonghua Renmin Gongheguo Zhuxi Ling (di 24 hao).

Zhonghua Renmin Gongheguo Kuaiji Fa.

GSC, 8 December 1999, Issue No. 36, Serial No. 963, pp. 1631-40.

21. Of particular significance, here, are the provisions of the Labour Law of the PRC in relation to the status, position and rights of the employees and workers of the individual-exclusive funded category of enterprises. In Article 6 of the IEFEL Law, it is stipulated that workers are to be employed by the enterprises according to law, and that workers have the right to form trade union organizations. It is also stipulated in Articles 22 and 23 that the enterprises are required to form proper legal contracts with employees and workers, to ensure their health and safety at work, to make due and proper payment of all wages and salaries, and to participate in the state-established social insurance programmes and to pay the social insurance premiums of workers as appropriate. In the context of these matters, as more generally, the individual-exclusive funded category of enterprises are to be considered as subject to the Labour Law, in its status as the legal framework having application to all forms of organized economic enterprises which possess legal standing as employing units. As regards the stipulations contained in the IEFEL Law, there should be particular reference made to the substantive elements of the Labour Law as follows: the guaranteed right of workers to organize and participate in trade unions (Article 7); contracts of employment (Articles 16-35); wages (Articles 46-51); occupational health and safety (Articles 52-57); social insurance and welfare (Articles 70-76). The Labour Law was adopted at the 8th Meeting of the Standing Committee of the 8th National People's Congress on 5 July 1994. The reference for the details of the Labour Law is as follows:

Decree No. 28 of the President of the People's Republic of China.

Labour Law of the People's Republic of China.

Zhonghua Renmin Gongheguo Zhuxi Ling (di 28 hao).

Zhonghua Renmin Gongheguo Laodong Fa.

GSC, 2 August 1994, Issue No. 16, Serial No. 765, pp. 678-91.

22. Certain of the duties and obligations stated in Chapter 5 of the IEFEL Law, and the sanctions and penalties relating to these, are presented as involving questions of criminal responsibility and thus also, and logically so, questions of criminal punishment. This is true in explicit terms in respect of the offence of forging business licences as mentioned in Article 35. However, it is to be taken as true implicitly of all those Articles, such as Articles 33 and 34, that are to do with fraud, misrepresentation and malpractice by investors in applications for the registration of enterprises, and for the issuing of business licences, through the relevant political-administrative authorities. It is also provided in Article 42 that criminal

responsibility attaches, and in principle that criminal punishment applies, to the concealment or transferring by investors of the capital assets and property of enterprises during the process of liquidation, such as to enable investors to evade their liabilities in respect of creditors. The provisions of the IEFE Law, as cited here, relate directly to matters of criminal law, and, in doing so, they serve to bring the affairs of the individual-exclusive funded category of enterprises squarely within the sphere of the ordinary criminal legal process. Thus it is to be emphasized that the enterprises, and specifically the enterprise investors and management officials, are subject to the provisions of the Criminal Law of the PRC. In particular, there is the direct application to the enterprise investors and management officials, in respect of their business activities and operations, of the relevant provisions contained in Chapter 3 of Part 2 of the Criminal Law, which provisions set down the various criminal offences involving the disruption of the socialist market economic order. The Criminal Law was adopted at the 2nd Session of the 5th National People's Congress on 1 July 1979, and with it being subsequently revised at the 5th Session of the 8th National People's Congress on 14 March 1997. The reference for the Criminal Law in its revised form is as follows:

Decree No. 83 of the President of the People's Republic of China.

Criminal Law of the People's Republic of China.

Zhonghua Renmin Gongheguo Zhuxi Ling (di 83 hao).

Zhonghua Renmin Gongheguo Xing Fa.

GSC, 4 April 1997, Issue No. 10, Serial No. 862, pp. 419-94.

23. For the purposes of the IEFE Law, the licensing of enterprises in the individual-exclusive funded category is a matter that comes within the jurisdiction and powers of the political-administrative authorities which are responsible for enterprise registration. However, the political-administrative authorities, in the matter of the licensing of enterprises, are required to make proper application of the law, and hence are to be considered as limited by law in the exercise of their official powers. The effect of this, as we observed in discussion of Articles 44-46 of the IEFE Law, is that the acts and decisions of the registration authorities with respect to enterprise licensing come within the sphere of administrative law, and so remain subject to the specific procedures that are available in law to parties which present themselves as adversely affected by administrative acts and decisions: reconsideration by administrative organs, and judicial review through the courts. Thus in connection with Articles 44-46, it should be noted that it is provided in Article 6, Section 8 of the Ad-

ministrative Reconsideration Law of the PRC that parties may seek the reconsideration of the acts and decisions of political-administrative authorities that refuse the issuing of licences, or other like documents, in circumstances where the parties claim that they have satisfied all the due legal conditions and requirements for the issuing of the same. Similarly, the parties may seek reconsideration in circumstances where they claim that political-administrative authorities have violated the prescribed lawful procedures in the issuing of licences and like documents. Again, it is provided in Article 11, Section 4 of the Administrative Procedure Law of the PRC that parties may seek the judicial review of the acts and decisions of political-administrative authorities which refuse to issue licences or other such documents, or which refuse to respond to applications for these, in circumstances where the parties claim that they have met the due legal conditions and requirements for successful application and legitimate expectation of official response. The Administrative Procedure Law was adopted at the 2nd Session of the 7th National People's Congress on 4 April 1989, while the Administrative Reconsideration Law was adopted at the 9th Meeting of the Standing Committee of the 9th National People's Congress on 29 April 1999. The reference details for the two statutes are as follows:

Decree No. 16 of the President of the People's Republic of China.

Administrative Procedure Law of the People's Republic of China.

Zhonghua Renmin Gongheguo Zhuxi Ling (di 16 hao).

Zhonghua Renmin Gongheguo Xingzheng Susong Fa.

*Compilation*, January-December 1989, pp. 1-18.

Decree No. 16 of the President of the People's Republic of China.

Administrative Reconsideration Law of the People's Republic of China.

Zhonghua Renmin Gongheguo Zhuxi Ling (di 16 hao).

Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa.

GSC, 8 June 1999, Issue No. 18, Serial No. 945, pp. 925-34.

24. The principles of unlimited liability governing the capital investment funding arrangements for the individual-exclusive funded form of enterprises are a fundamental feature of this category of enterprises, as enterprises belonging to the private enterprise sector. It should be noted that the unlimited liability principles extend in their application to the partnership enterprises, and that it is very largely for this reason that the individual-exclusive funded category of enterprises are to be classed together with the partnership enterprises and in opposition to the enterprises which are established as corporations proper. (As regards the un-



limited liabilities of the individual persons who are the members of partnership enterprises, as a matter of general legal principle, see Article 2 of the Partnership Enterprise Law. For the obligations of partners in respect of the debts owed by partnership enterprises to third parties, as in accordance with the principles of unlimited liability, see Articles 39 and 40; and for the obligations of partners in respect of debts owed to third parties, as arising from unlimited liability, on the occasion of the dissolution of partnership enterprises and the liquidation of enterprise assets and property, see Article 62.) It should be noted also that the officials of the state government have been at pains to underline in explicit terms that the individual-exclusive funded category of enterprises, as based in unlimited liability principles, are by reason of their foundation in these principles to be clearly distinguished from enterprises which possess the legal person status of corporations. So, for example, there is Article 6 of the Measures Concerning the Registration of Individual-Exclusive Funded Enterprises, where it is stipulated that the enterprises to which the IEFE Law applies are not to use the terms 'limited', 'limited liability' and 'corporation' in their registered enterprise names. In addition to this, there are the remarks made in explanation of the Measures by Hu Xiugan, the head official of the Department for the Inspection and Management of the Individual Funded Economy (Guojia Gongshang Xingzheng Guanli Geti Jingji Jiandu Guanlisi Sizhang) which comes under the State Administration for Industry and Commerce. Thus it is explained that the enterprises may be designated as factories, shops, centres, works and so on, but are not permitted to designate themselves as corporations. For this, see: *Renmin Ribao* (*People's Daily*), 20 January 2000, p. 2.

25. Regarding the origins of the private enterprise sector in the small-scale agricultural businesses, see: *Beijing Review*, 44 (25 January 2001), p. 15. As an example of the commercial success of the entrepreneurs in the rural areas who initiated business concerns in the early 1980s, there is the case of the Liu brothers who specialized in the field of animal forage production, and who were to go on to form a corporate empire which is reckoned to stand as the premier private business enterprise in the PRC in terms of total capital assets. For details on this, see: *Beijing Review*, 45 (23 May 2002), pp. 15-20.

26. Regarding the report made by Jing Shuping for the All China Federation of Industry and Commerce, see the internet posting of the *China Daily* for 18 December 2001 (at <http://www1.chinadaily.com.cn/news/cb/>

2001-12-18/48434.html).

27. For the details on the private enterprise sector in Shandong Province and for those on Shanghai, see the internet postings of the *China Daily* for 6 August 2002 (at <http://www1.chinadaily.com.cn/bw/2002-08-06/81994.html>) and for 9 August 2002 (at <http://www1.chinadaily.com.cn/news/cb/2002-08-09/81473.html>).

28. Thus the state-governmental authorities are pursuing a general strategy aimed at the creation of conditions favourable to the engagement in private enterprises on the part of laid-off industrial workers, and with a view to bringing about through this some significant reduction in the levels of unemployment. As an indication of the strategy in its practical application, there are the recent policy statements issued jointly by the State Council and the State Administration for Industry and Commerce. According to the terms of these, laid-off industrial workers who apply to establish small individual business enterprises are to be exempted for three years from paying the due fees to the relevant local-level industry and commerce departments, as in respect of applications, registrations, business management, advertising management, market booths and contracts. For details of this, see the internet posting of the *China Daily* for 26 November 2002 (at <http://www1.chinadaily.com.cn/hk/2002-11-26/95311.html>). For an example of the administrative norms pertaining to this, see:

Circular of the General Office of the State Council on Preferential Policies on Fees Collected for Individual Businesses Engaged in by Laid-Off Workers and the Unemployed.

Guowuyuan Bangongting Guanyu Xiangang Shiye Renyuan Congshi Geti Jingying Youguan Shoufei Youhui Zhengce de Tongzhi.

GSC, 20 November 2002, Issue No. 32, Serial No. 1067, pp. 20-1.

29. So, for example, there is the position on this matter as taken by the distinguished economist Dong Fureng. For the details of this, see: *Beijing Review*, 44 (25 January 2001), p. 12.

30. For the specification of these various industries as the main sectors for the private enterprises, see: *Beijing Review*, 45 (13 June 2002), p. 22.

31. In connection with financial services, there is the case of Minsheng Securities in Beijing, with this being the first securities company in the

PRC to have the greater part of its capital investment drawn from private sources. For details, see the internet posting of the *China Daily* for 19 August 2002 (at <http://www1.chinadaily.com.cn/news/cb/2002-08-19/82703.html>).

32. As regards the private enterprise sector and banking services in the PRC, the current projections are for the establishing of several new private banks during 2003, and with these being understood as going to build on the success of the China Minsheng Banking Corporation as the first bank in the PRC based in private ownership. For the forecast on the private banking sector for 2003 and for a report by the founder of the China Minsheng Banking Corporation, see the internet postings of the *China Daily* for 31 December 2002 (at <http://www1.chinadaily.com.cn/bw/2002-12-31/10047.html>) and for 12 January 2003 (at <http://www1.chinadaily.com.cn/news/2003-01-12/101019.html>). At a more general level, it should be noted that state government officials have now come increasingly to promote the cause of the private service-orientated enterprises, and in line with projections as to the future massive growth in this part of the private enterprise sector. Thus, for example, Vice-Premier Wen Jiabao is on record as calling for the private enterprises to participate more in the service sector, and this in the context of the forecasting by economists that by 2005 some 33% of the labour force in the PRC will be employed in the service industries. For the details on this, see the Report of *Xinhua News Agency* for 24 April 2002.

33. As regards the commitments concerning the fulfilment of WTO treaty obligations, see, for example, the views of Wang Yang, the Vice Minister at the State Planning and Development Commission of the State Council: *Beijing Review*, 45 (6 June 2002), p. 30.

34. For the English translation of the 1982 State Constitution, see: Constitution of the People's Republic of China, as adopted at the Fifth Session of the Fifth National People's Congress and Promulgated for Implementation by the Proclamation of the National People's Congress on December 4, 1982, 3rd edition (PRC, Beijing: Foreign Languages Press, 1994).

35. For the English translation of the Amendment to Article 11 of the State Constitution as adopted at the 1st Session of the 7th National People's Congress on 12 April 1988, see: 1994 edition of the State Constitu-

tion, p. 87.

36. The English translation of the revised form of Article 8 of the State Constitution, as adopted as an Amendment of the State Constitution at the 1st Session of the 8th National People's Congress on 29 March 1993, is as follows: 'The rural contracted responsibility system based mainly on the household linking remuneration to output and cooperative economic forms - producers', supply and marketing, credit and consumers' cooperatives - are part of the socialist economy collectively owned by the working people. Working people who are members of rural economic collectives have the right, within the limits prescribed by law, to farm plots of cropland and hilly land allotted for their private use, engage in household sideline production and raise privately owned livestock.' 1994 edition of the State Constitution, p. 93.

37. It should be noted that Article 8 of the State Constitution, in its amended form from 1999, is so revised that the reference to the household contract responsibility system in the rural areas is put in the following terms: 'Rural collective economic organizations practice the double-tier management system that combines unified and separate operations on the basis of the household-based output-related contracted responsibility system.' For the English translation of the Amendments to Article 6, 8 and 11 of the State Constitution as adopted at the 2nd Session of the 9th National People's Congress on 15 March 1999, see: *Beijing Review*, 42 (3 May 1999), pp. 14-15.

38. So it is that the private enterprise owners are recognized to form one of the ten major social strata in the PRC, as according to the findings of the latest research report on social strata prepared by the Chinese Academy of Social Sciences. The other strata are as follows: state and social administrative officials; management personnel; professional and technical personnel; office staff; self-employed business people; commercial and service staff; industrial workers; agricultural workers; unemployed and semi-employed inhabitants. For the full details for this, see: *Beijing Review*, 45 (21 March 2002), pp. 22-3.

39. For the 1999 revision of the Preamble to the State Constitution where Deng Xiaoping Theory is recognized as standing with Marxism-Leninism and Mao Zedong Thought to form the guiding normative framework for the advance towards the development of socialism, see: Amendments to

the Constitution of the PRC, *Beijing Review*, 42 (3 May 1999), p. 14.

40. The setting out by Jiang Zemin of the doctrine of the Three Represents in February 2000 came during his inspection visit at that time to Guangdong Province in Southern China. For details, see: *Renmin Ribao* (*People's Daily*), 21 February 2000, pp. 1, 4. There is also the Keynote Speech that Jiang Zemin delivered on 1 July 2001 on the occasion of the 80th Anniversary of the CPC. For the text of this, see: *Renmin Ribao* (*People's Daily*), 2 July 2001, pp. 1-4.

41. For example, it is the thought of the Three Represents that is made direct reference to in the following policy document on private sector investment, as issued by the State Planning and Development Commission: Circular of the State Planning and Development Commission on Printing and Issuing Several Opinions on Promoting and Guiding Non-Governmental Investment.

Several Opinions on Promoting and Guiding Non-Governmental Investment.

Guojia Jiwei Guanyu Yinfa Cujin he Yindao Minjian Tuozi de Rougan Yijian de Tongzhi.

Guojia Jiwei Guanyu Cujin he Yindao Minjian Tuozi de Rougan Yijian. *GSC*, 20 September 2002, Issue No. 26, Serial No. 1061, pp. 22-3.

42. The key Chinese-language official documents relating to the 16th National Congress of the CPC which are to be consulted in connection with the thought of the Three Represents are as follows:

Report Delivered by Jiang Zemin at the 16th National Congress of the Communist Party of China on behalf of the 15th National Congress of the Communist Party of China as of 8 November 2002, and entitled:

Build a Well-Off Society in an All-Round Way and Create a New Situation in Building Socialism with Chinese Characteristics.

Quanmian Jianshe Xiaokang Shehui Kaichuang Zhongguo Tesi Shehui Zhuyi Shiye Xin Jumian.

*Renmin Ribao* (*People's Daily*), 18 November 2002, pp. 1-4.

Resolution of the 16th National Congress of the Communist Party of China on the Report of the 15th Central Committee of the Communist Party of China, as adopted on 14 November 2002.

Zhongguo Gongchandang Di 16ci Quanguo Daibiao Dahui Guanyu 15jie Zhongyang Weiyuanhui Baogao de Jueyi. 2002nian 11yue 14ri Zhongguo Gongchandang Di 16ci Quanguo Daibiao Dahui Tongguo.

*Renmin Ribao (People's Daily)*, 15 November 2002, p. 2.

Amendments to the Constitution of the Communist Party of China, as adopted by the 16th National Congress of the Communist Party of China on 14 November 2002.

Zhongguo Gongchandang Di 16ci Quanguo Daibiao Dahui Guanyu 'Zhongguo Gongchandang Zhangcheng (Xiuzheng'an)' de Jueyi. (2002nian 11yue 14ri Zhongguo Gongchandang Di 16ci Quanguo Daibiao Dahui Tongguo.)

*Renmin Ribao (People's Daily)*, 15 November 2002, p. 2.

Constitution of the Communist Party of China (Zhongguo Gongchandang Zhangcheng), as amended and adopted at the 16th National Congress of the Communist Party of China on 14 November 2002. For full Chinese text with English translation in two parts, see: *Beijing Review*: 45 (19 December 2002), Supplement; 45 (26 December 2002), Supplement.

It should be noted that the thought of the Three Represents was formally endorsed on 16 November 2002 at the 1st Meeting of the Political Bureau of the 16th Central Committee of the CPC, as convened by Hu Jintao in his capacity as the new Party General Secretary. For details, see: *Renmin Ribao (People's Daily)*, 17 November 2002, p. 1.

43. Thus there is a crucial Amendment made to Chapter 1, Article 1 of the Constitution of the CPC, where the qualifications for CPC membership are set down. Prior to the 16th National Congress of the CPC, membership of the CPC was specified as being open to workers, farmers, members of the armed forces, intellectuals and the other so-called revolutionaries. As of now, however, it is provided in Chapter 1, Article 1 that Chinese workers, farmers, members of the armed forces, intellectuals or any advanced elements of other social strata who have reached the age of eighteen and who accept the programme and Constitution of the CPC and are willing to join and work in Party organizations, to implement Party decisions and to pay membership dues regularly are eligible to make application for membership of the CPC. This Amendment is explained as serving to strengthen the class foundations of the CPC, to enhance its cohesion and to extend its influence within society, and it is in these respects fully in accordance with the principles given in the thought of the Three Represents. For details, see: *Renmin Ribao (People's Daily)*, 15 November 2002, p. 2.

44. As regards the public economic sector, the amending of the Constitution of the CPC at the 16th National Congress of the CPC involved confir-

mation of the place of the CPC committee organizations within the state industrial sector enterprises, but in terms where it was provided that the CPC committee organizations were to have standing within the industrial SOEs as established with the legal form of corporate entities. Thus Article 32 of the Constitution of the CPC was amended such that the CPC committee organizations were to act within the institutional framework of the incorporated industrial SOEs, through performing a backing role for the meetings of share-holders, the boards of directors, the management officials and the supervisory boards in the exercise of their functions and powers according to law. The Amendment to Article 32, as here noted, underlines the intention of the Party-State leadership to preserve the institutional forms of CPC organizational power in the context of the corporate sphere in the PRC. For details of the Amendment to Article 32, see: *Renmin Ribao (People's Daily)*, 15 November 2002, p. 2.

45. It is to be observed, in this connection, that Article 32 of the Constitution of the CPC, in its amended form as adopted at the 16th National Congress of the CPC, includes a specific provision confirming the presence, and defining the functions and powers, of the CPC committee organizations as are established in the enterprises which belong to the non-public economic sector. Thus Article 32 is revised such that it now contains a full new paragraph. In this, it is stipulated that in non-public economic sector enterprises, the established CPC organizations are to carry out the principles and policies of the CPC, to guide the enterprises and supervise them in observing the laws and administrative regulations of the state, to exercise leadership over the trade union organizations and other mass representative bodies, to rally the workers and office staff around them, to safeguard the legitimate rights and interests of all concerned parties, and to promote the virtuous development of the enterprises. The terms of the revision obviously serve to entrench institutional CPC control over the means of industrial production. There are also underlined the newly defined representative functions and powers of the CPC, as, in accordance with the thought of the Three Represents, the CPC organizations are strengthened in their links with the non-public economic sector and, most particularly, with the workers and staff in the non-public economic sector enterprises. For details of this revision, see: *Renmin Ribao (People's Daily)*, 15 November 2002, p. 2. For background discussion of the current trends towards the establishing of CPC organizations in the private enterprises, see: *Beijing Review*, 46 (9 January 2003), pp. 24-7.

46. The campaign for the eradication of corruption within the CPC organizational structure stands out as one of the main political priorities identified by the new Party-State leadership that emerged at the 16th National Congress of the CPC. In this connection, there is the first major policy speech by Hu Jintao as General Secretary of the CPC, which he delivered in Hebei Province on 6 December 2002: Jianchi Fayang Jianku Fendou de Youliang Zuofeng Nuli Shixian Quanmian Jianshe Xiaokang Shehui de Hongwei Mubiao. For the full text of the speech, see: *Renmin Ribao (People's Daily)*, 3 January 2003, pp. 1-2.